Supreme Court, U.S.
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In The

Supreme Court of the United States

BASHO ELLIOT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether "manifest necessity" is the appropriate Double Jeopardy standard of review for permitting retrial after a mistrial is declared over the defendant's objection for attorney conflict of interest discovered during trial after jeopardy has attached?

2. Whether the Court should adopt the "deliberate election" Double Jeopardy standard of review for attorney conflict of interest issues that arise during the trial which allows the defendant to choose between accepting a mistrial, or continuing the trial, thereby waiving the conflict issue for appeal?

PARTIES TO THE PROCEEDING

The petitioner is BASHO ELLIOT. The respondent is the United States of America.

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PETITION FOR WRIT OF CERTIORARI

The petitioner BASHO ELLIOT petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals dated August 28, 2006 is reported at ___ F.3d ___ and is attached hereto as Appendix A. The District Court Order dated October 1, 2004 is attached as Appendix B.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS

The Double Jeopardy Clause of the Fifth Amendment reads:

> "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

The Right to Counsel Clause of the Sixth Amendment reads:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Petitioner and Defendant, Basho Elliot, [herein after petitioner] was charged with conspiracy to distribute and to possess with the intent to distribute cocaine, 21 U.S.C. §§846 and 841(a)(1), and attempted possession with intent to distribute cocaine. 21 U.S.C. §§846 and 841(a)(1). During petitioner's trial, just prior to the final arguments of counsel to the jury, the District Court declared a mistrial over petitioner's objection. Thereafter petitioner filed a motion to dismiss the case on the grounds that further prosecution was barred under the Double Jeopardy Clause of the Fifth Amendment. The District Court denied the motion.

On May 1, 2003, Frank Herbert, a California State Bureau of Narcotics Enforcement Agent, working at a Federal Express hub in the city of Van Nuys, California, located a suspicious package containing two kilograms of cocaine. It was in the process of being sent from California to Hawaii. Agent Herbert decided to make contact with narcotics officers in Hawaii in order to arrange for a controlled delivery of the package containing cocaine. (3 R.T. 41-51).

A monitoring device was placed in the package and on May 6, 2003, an undercover police officer dressed as a Federal Express driver delivered the package to 116 Kapunakea Street, the home of the girlfriend of John Meston. (3 R.T. 93-100). Five minutes later, John Meston arrived at the residence. He retrieved the package and drove the package to petitioner's residence, where he went inside. (3 R.T. 100-103). Petitioner and John Meston were arrested inside petitioner's residence with the package. (3 R.T. 104-105).

John Meston testified as a government witness. He pleaded guilty in connection with this case in exchange for the possibility of receiving a lesser sentence. Meston testified that sometime in 2002 petitioner had asked him to receive a package. Petitioner promised to pay Meston $1,500.00 for receiving the package. Meston agreed and later a Federal Express package arrived at his residence. He then took the package to the residence of petitioner. He gave the package to petitioner and was paid $1,500.00 in cash. (4 R.T. 204-214).

Meston testified that a second, third, and fourth package was delivered to him by Federal Express. On each occasion, he turned over the package to petitioner and was paid $2,000.00 for each package which he accepted for delivery. (4 R.T. 214-221). On May 6, 2003, Meston received a fifth package under the same circumstances and after receiving the package he took the package to the residence of petitioner. (4 R.T. 221-222). Shortly after he arrived, the police entered the residence and arrested Mr. Meston and petitioner. (4 R.T. 223-232).

Sergio Hevia was called as a defense witness. Sergio Hevia testified that on May 1, 2003 John Meston had asked him to pick up a box and take it to Federal Express and ship it to Hawaii. He told him to meet with his friend Randy at a Burger King. Hevia picked up the package from Randy, took it to Federal Express in Van Nuys, and shipped it to Hawaii. According to Hevia, John Meston did not tell him what was inside the package. (7 R.T. 121-123). A few weeks later Sergio Hevia called John Meston. Meston told Hevia that Meston was in trouble and Meston asked Hevia not to call him anymore. (7 R.T. 124-125).

On cross-examination, Sergio Hevia testified that after his last conversation with John Meston, he felt disturbed and uncomfortable and decided to go see an attorney, Richard Gordon, who was the defense counsel for the petitioner. (7 R.T. 181; E.R. 6). The Court then asked Mr. Gordon if Mr. Hevia contacted Mr. Gordon for legal advice and then Mr. Gordon decided to use him as a defense witness on behalf of the petitioner. Mr. Gordon advised the Court that because of the attorney-client privilege, he could not answer that question. (7 R.T. 191-192; E.R. 16-17). The Court thought that there was a conflict of interest because Mr. Gordon was the lawyer for both petitioner and the defense witness Mr. Hevia. (7 R.T. 193; E.R. 18). Sergio Hevia told the Court that after the call he went to see Mr. Gordon to obtain legal advice. (7 R.T. 196; E.R. 21).

The Court then appointed a lawyer to represent Sergio Hevia. After consulting with counsel, Mr. Hevia advised the Court that he would be invoking his rights under the Fifth Amendment and would refuse to answer any further questions on cross-examination. (7 R.T. 216-218; E.R. 40-41). Over the defense objection (7 R.T. 219; E.R. 43), the Court instructed the jury that Mr. Hevia would not be continuing with his testimony and that the Court was striking all of his testimony. (7 R.T. 223; E.R. 47).

At the next Court hearing, the Court directed the petitioner and his two defense counsel to discuss the conflict of interest issue in private. After that discussion, petitioner confirmed that he had discussed the issue with his attorneys and that he wish to proceed with the jury trial while being represented by Richard Gordon as his attorney. (8 R.T. 4-6; E.R. 52-54). The prosecutor stated

that the Court must declare a mistrial, unless petitioner waives his right to conflict-free counsel. (8 R.T. 6-8; E.R. 54-56). The Court in a lengthy colloquy advised petitioner concerning his right to conflict-free counsel and the dangers of proceeding with an attorney who has a conflict of interest. To all of these questions, petitioner acknowledged that he understood what the Court was saying. (8 R.T. 8-14; E.R. 56-62).

The Court then asked petitioner personally: "So let me understand this. You're insisting on keeping Mr. Gordon and Mr. Lowenthal, and you're objecting to a mistrial." Petitioner responded "Yes, your honor." (8 R.T. 14; E.R. 62). Defense counsel then stated that petitioner was not waiving any of his rights and he was specifically reserving all of his rights. (Id.) When the Court asked if petitioner was not waiving any conflict of interest that defense counsel may have created, Mr. Gordon responded "That's correct." (8 R.T. 15; E.R. 63).

When the Court asked whether counsel was either admitting or denying that he had a conflict of interest, Mr. Gordon stated that he was not taking a position. (8 R.T. 22; E.R. 69). The Court felt that because defense counsel was not denying that he had a conflict of interest, there was a grave cloud over his continuing to represent petitioner. The Court accused defense counsel of wanting to have his cake and eat it too and of playing games. The Court felt that petitioner was in grave danger of having an attorney with a conflict of interest. (8 R.T. 22-24; E.R. 69-71).

The Court stated that to insure conflict-free representation of petitioner, petitioner would have to get a new attorney. The Court then concluded that there was manifest

necessity for a mistrial. (8 R.T. 24; E.R. 71). The government expressly stated that they were in agreement with the Court's decision to declare a mistrial. (8 R.T. 25; E.R. 72). The Court declared a mistrial and discharged the jury. (8 R.T. 26-27; E.R. 73-74).

Petitioner moved to dismiss the case on the grounds that further prosecution was barred by Double Jeopardy. Petitioner argued that any conflict of interest that existed in the case was cured when the Court struck the testimony of Sergio Hevia. (E.R. 105, 107, 112). Furthermore, the conflict did not cause any harm to petitioner's case. Hevia's testimony, before it was stricken, was helpful to the defense. Petitioner argued that under Supreme Court case law, a conflict of interest is only reversible error on appeal if the record showed that the conflict actually prejudiced petitioner. *Mickens v. Taylor*, 535 U.S. 162, 172-174 (2002) Manifest necessity for a mistrial exists only if reversal on appeal would have been a certainty. Counsel argued that since there was no actual prejudice, the alleged conflict of interest would not have resulted in a reversal of the conviction. Hence, there was no manifest necessity and double jeopardy barred any retrial. (E.R. 108-109; 112-114; 116-117; 124; 135).

The District Court denied the motion to dismiss on double jeopardy grounds finding that there was manifest necessity for declaring a mistrial at petitioner's first trial. (E.R. 144a). The Court stated that petitioner's attorney, Richard Gordon, had a conflict of interest because, in addition to representing petitioner, he had also represented defense witness, Sergio Hevia. When an attorney was appointed to represent Sergio Hevia, Mr. Hevia asserted his Fifth Amendment privilege and refused to

answer further questions. Thereafter, the Court struck the testimony of Hevia. (E.R. 151-154).

When the conflict of interest issue was explained to petitioner, petitioner stated he wa ted Richard Gordon to continue as his lawyer and he wanted to continue with the trial. Petitioner objected to any mistrial. However, petitioner's attorney would not allow petitioner to waive his right to conflict-free counsel, stating that petitioner was not waiving any of his rights and was reserving all of his rights. (E.R. 157-159). The Court stated that it had declared a mistrial because petitioner's counsel had a conflict of interest between petitioner and defense witness Sergio Hevia, at least a potential one. App. 52. Since petitioner would not waive the conflict, there was manifest necessity for declaring a mistrial. (E.R. 160-161). Finally, the District Court found there was manifest necessity for declaring a mistrial because the existence of the conflict of interest would have made reversal of any conviction after the first trial a certainty. (E.R. 174-183).

The Court also found that Richard Gordon had a conflict with petitioner that justified the mistrial. The Court believed that Sergio Hevia committed perjury in his testimony. When Gordon refused to answer the Court's questions concerning whether he had a conflict of interest, his refusal to answer was evidence of a conflict of interest between Gordon and petitioner. By not answering the Court's questions, counsel was acting to protect himself from being charged with perjury for calling Hevia as a defense witness. The Court held this was a conflict that constituted manifest necessity for declaring a mistrial. (E.R. 163-164; 173-174; 182a-183). Appendix B.

On appeal, the Ninth Circuit Court of Appeals affirmed. The Court noted that a mistrial over a defendant's objection does not bar retrial if there was manifest necessity. Manifest necessity exists if the legal error would make reversal on appeal a certainty. The Court held that Gordon's conflict of interest based on his former representation of Hevia would have made reversal on appeal "almost certain." App. 4 and 17. Recognizing that reversal of a conviction requires that the record demonstrate that the conflict adversely affected the counsel's performance, the Court determined that Gordon's deficient performance was his failure to do more to keep Hevia on the witness stand and prevent the striking of Hevia's testimony. App. 15. Petitioner's double jeopardy claim was denied. Appendix A.

REASONS FOR GRANTING THE PETITION

I

MANIFEST NECESSITY IS THE WRONG DOUBLE JEOPARDY STANDARD OF REVIEW FOR PERMITTING RETRIAL AFTER A MISTRIAL IS DECLARED FOR ATTORNEY CONFLICT OF INTEREST OVER THE DEFENDANT'S OBJECTION

The Double Jeopardy Clause of the Fifth Amendment protects a criminal defendant from repeated prosecutions for the same offense. *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982); *United States v. Dinitz*, 424 U.S. 600, 606 (1976). As a part of this protection against multiple prosecutions, the Double Jeopardy Clause affords a criminal defendant a "valued right to have his trial completed by a particular tribunal." *Wade v. Hunter*, 336 U.S. 684, 689 (1949);

United States v. Jorn, 400 U.S. 470, 484-485 (1971); *Downum v. United States*, 372 U.S. 734, 736 (1963).

In *United States v. Perez*, 9 Wheat. 579, 580 (1824) this Court held that the question under the Double Jeopardy Clause whether there can be a new trial after a mistrial has been declared without the defendant's request or consent depends upon whether "there is a manifest necessity for the [mistrial], where the ends of public justice would otherwise be defeated." In *Perez*, the trial judge had on his own motion declared a mistrial because of the jury's inability to reach a verdict. The Court held that the jury's inability to reach a verdict constituted "manifest necessity" authorizing the mistrial and the Double Jeopardy Clause did not bar the defendant's retrial. See also, *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003); *Richardson v. United States*, 468 U.S. 317 (1984).

In *Arizona v. Washington*, 434 U.S. 497 (1978) a trial judge granted the prosecutor's motion for a mistrial based on the improper and prejudicial comments made during defense counsel's opening statement that evidence had been hidden from the defendant during the first trial. The Court held that retrial of the defendant was not barred by the Double Jeopardy Clause because there was manifest necessity for the mistrial. The Court noted that "defense counsel's comment was improper and may have affected the impartiality of the jury." Id. at 511. The Court noted that "Unless unscrupulous defense counsel are to be allowed an unfair advantage, the trial judge must have the power to declare a mistrial in appropriate cases." Id. at 513.

In *Illinois v. Somerville*, 410 U.S. 458 (1973) the trial judge declared a mistrial over the defendant's objection after

the jury had been sworn based upon a defect in the indictment which could not be cured by amendment and which on appeal could be asserted to overturn any judgement of conviction. This Court found there was manifest necessity for the mistrial and the Double Jeopardy Clause did not bar re-prosecution of the defendant. The Court stated: "If an error would make reversal on appeal a certainty, it would not serve 'the ends of public justice' to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court." Id. at 464.

In petitioner's case, the Ninth Circuit upheld the granting of a mistrial over petitioner's objection. The mistrial was declared because his attorney had a conflict of interest. The Ninth Circuit held there was manifest necessity for the mistrial and the Double Jeopardy Clause did not bar re-prosecution of petitioner. The Court noted that defense counsel representing petitioner had formerly represented defense witness Sergio Hevia. Hevia was called as a defense witness in petitioner's case and his testimony helped petitioner during the trial. During cross-examination, Hevia asserted his Fifth Amendment privilege. His refusal to submit to cross-examination resulted in the trial judge striking Hevia's testimony. The Ninth Circuit found that the striking of Hevia's testimony prejudiced the petitioner; that it was caused by trial counsel's conflict of interest; and that the conflict would make reversal of any conviction on appeal "almost certain." App. 15-17.

Petitioner strenuously argued before the Ninth Circuit that the conflict of interest in his case did not adversely affect counsel's performance and would not have been reversible error on appeal under this Court's decision

in *Mickens v. Taylor*, 535 U.S. 162 (2002). The Sixth Amendment right to counsel includes the right to representation "free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981). However, the Court will not reverse a criminal conviction based upon a mere potential conflict of interest. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). A criminal conviction may only be reversed for an actual conflict of interest, which is "a conflict of interest that adversely affects counsel's performance." *Mickens v. Taylor*, supra, at 172 n.5. Because an actual conflict of interest is defined by its impact on counsel's performance at trial, the reversible nature of a conflict of interest is normally determined after the trial has concluded and after the defendant has been convicted.

An attorney conflict of interest will only result in a reversal of a criminal conviction if "the conflict has significantly affected counsel's performance – thereby rendering the verdict unreliable." *Mickens v. Taylor*, supra, at 171. For example, in *Glasser v. United States*, 315 U.S. 60, 75 (1942), an attorney representing two defendants in the same trial failed to cross-examine a witness and failed to object to inadmissible evidence in order to protect one defendant at the expense of the other. See also, *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978).

In petitioner's case, Sergio Hevia's testimony helped petitioner by impeaching Government witness John Meston. Petitioner's case is an example where joint representation benefitted both clients. As Justice Frankfurter noted: "Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack." *Glasser v. United*

States, supra, at 92 (dissenting opinion) cited approvingly in *Holloway v. Arkansas*, supra, at 482-483.[1]

In *Wheat v. United States*, 486 U.S. 153 (1988), this Court held that in the pretrial stage of a criminal case, a District Court has broad discretion in refusing to accept a defendant's waiver of his right to conflict-free counsel and in refusing to permit a substitution of attorneys which might cause a conflict of interest. Because *Wheat* involved a pretrial ruling, the Double Jeopardy Clause was not implicated. Nevertheless, this Court noted that it is difficult to rule upon conflicts of interest until "after the trial has taken place." Id. at 152. The Court further stated:

> The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials. It is a rare attorney who will be fortunate enough to learn the entire truth from his own client, much less be fully apprised before trial of what each of the Government's witnesses will say on the stand. A few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants. These imponderables are difficult enough for a lawyer

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[1] Petitioner was surprised and distressed at the District Court's suggestion that a mistrial was necessary because Sergio Hevia may have committed perjury during the trial. The Sixth Amendment gives the defendant a right to offer the testimony of witnesses "to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19 (1967). A defendant's constitutional right to a jury trial gives the defendant "the right to have the jury, rather than the judge, reach the requisite finding of guilty." *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993).

> to assess, and even more difficult to convey by way of explanation to a criminal defendant untutored in the niceties of legal ethics. Id. at 152-153.

Because of the difficulty in assessing the prejudicial nature of a conflict of interest during the middle of a trial, the manifest necessity standard for granting a mistrial over the defendant's objection is particularly unsuited. The District Court in petitioner's case made several errors in finding manifest necessity and declaring a mistrial. For example, the District Court identified only a potential conflict of interest resulting from counsel's successive representation of the petitioner and a defense witness.[2] The existence of a potential conflict of interest would not make reversal on appeal a certainty under *Mickens v. Taylor*, 535 U.S. 162 (2002). The District Court and the Ninth Circuit found that the conflict of interest would make reversal on appeal "almost certain" rather than finding that "reversal on appeal [would be] a certainty," as required by *Illinois v. Somerville*, 410 U.S. 458, 464 (1973).[3]

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[2] Petitioner's attorney Richard Gordon had formerly given legal advice to defense witness Sergio Hevia relating to the same criminal charges brought against petitioner. This was no different from the non-prejudicial potential conflicts of interest discussed in this Court's opinions. See, *Mickens v. Taylor*, 535 U.S. 162 (2002) [Attorney representing defendant on murder charges had formerly represented the deceased victim.]; *Cuyler v. Sullivan*, 446 U.S. 335 (1980) [Attorney's law firm had represented two defendants charged with the same murder, but at separate trials.]

[3] At least one other Court of Appeal has made the same mistake by finding manifest necessity based on a finding that the attorney conflict of interest might possibly cause a reversal on appeal. *United States v.*

(Continued on following page)

Finally, both the District Court and the Ninth Circuit erroneously determined that the conflict of interest caused Sergio Hevia's testimony to be stricken when he asserted the Fifth Amendment. This finding was necessary in order to make the conflict an actual conflict, which is "a conflict of interest that adversely affects counsel's performance." *Mickens v. Taylor*, supra, at 172 n.5. However, the conflict had nothing to do with the striking of Hevia's testimony. The testimony was stricken because when Hevia asserted the Fifth Amendment he refused to submit to cross-examination. See *Brown v. United States*, 356 U.S. 148, 156 n.5 (1958) [Striking the witnesses' testimony is one remedy for the witnesses' assertion of the Fifth Amendment during cross-examination.].

Applying the manifest necessity test in petitioner's case was extremely difficult for both the District Court and Court of Appeal. When an attorney conflict of interest issue arises during the middle of a trial there are too many variables to allow for easy resolution of the problem by the Court without violating the defendant's rights under the Double Jeopardy Clause. In cases where a conflict of interest arises during trial the manifest necessity test is not "a manageable standard to apply." *Oregon v. Kennedy*, supra, at 675 [Case simplifying Double Jeopardy Standard in cases of a mistrial based on prosecutorial misconduct.]; see also, *Illinois v. Somerville*, 410 U.S. 458, 483 (1973) [Justice Marshall dissenting and stating that the manifest necessity test provides "virtually no guidance."]. The better approach is to adopt the easily applied "deliberate election" test of *United States v. Scott*, 437 U.S. 82, 93

Combs, 222 F.3d 353, 360 (7th Cir. 2000) [Manifest necessity found "even where reversal is not a certainty."]

(1978) which is discussed in the next argument in this petition. Under that test, petitioner's reprosecution in this case would be barred by the Double Jeopardy Clause.

II

THE DELIBERATE ELECTION TEST IS THE CORRECT DOUBLE JEOPARDY STANDARD OF REVIEW FOR ATTORNEY CONFLICT OF INTEREST ISSUES THAT ARISE DURING TRIAL AND ALLOWS THE DEFENDANT TO CHOOSE BETWEEN ACCEPTING A MISTRIAL OR CONTINUING THE TRIAL, THEREBY WAIVING THE CONFLICT ISSUE FOR APPEAL

Where a trial is terminated over the objection of the defendant, the classic test for lifting the Double Jeopardy bar to a second trial is the "manifest necessity" standard. The prototypical example of manifest necessity justifying a mistrial is the case where the jury is unable to reach a verdict. *United States v. Perez*, 9 Wheat. 579, 580 (1824). In those cases, the "manifest necessity" standard provides sufficient protection to the defendant's interest in having his case finally decided by the jury first selected while at the same time maintaining "the public's interest in fair trials designed to end in just judgments." *Wade v. Hunter*, 336 U.S. 684, 689 (1949).

However, the "manifest necessity" standard does not apply in every case where Double Jeopardy issues arise. In *Oregon v. Kennedy*, 456 U.S. 667, 673 (1982) this Court stated that "in the case of a mistrial declared at the behest of the defendant, quite different principles come into play. Here the defendant himself has elected to terminate the proceedings against him, and the 'manifest necessity'

standard has no place in the application of the Double Jeopardy Clause." (Emphasis added.).

"[A] motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by a prosecutorial or judicial error." *United States v. Jorn*, 400 U.S. 470, 485 (1971). "Such a motion by the defendant is deemed to be a *deliberate election* on his part to forego his valued right to have his guilt or innocence determined before the first trier fact." *United States v. Scott*, 437 U.S. 82, 93 (1978) (Emphasis added.). "The important consideration, for purposes of the Double Jeopardy Clause, is that the *defendant retain primary control* over the course to be followed in the event of such error." *United States v. Dinitz*, 424 U.S. 600, 609 (1976) (Emphasis added.).

"Even when judicial or prosecutorial error prejudices a defendant's prospects of securing an acquittal, he may nonetheless desire 'to go to the first jury and perhaps, end the dispute then and there with an acquittal.'" *United States v. Dinitz*, supra, at 608, quoting *United States v. Jorn*, supra, at 484. In *Dinitz*, the Court recognized the defendant's right to pursue this course in the absence of manifest necessity requiring a sua sponte judicial declaration of a mistrial. Ibid.

In petitioner's case there were two constitutional rights at issue. First, under the Double Jeopardy Clause petitioner had a constitutional right "to have his trial completed by a particular tribunal," that is, the first jury selected to hear his case. *Wade v. Hunter*, 336 U.S. 684, 689 (1949); *Oregon v. Kennedy*, supra, at 672. Second, petitioner had a Sixth Amendment constitutional right to conflict-free counsel. *Mickens v. Taylor*, 535 U.S. 162

(2002); *Wheat v. United States*, 486 U.S. 153 (1988). When these two rights become in conflict during the middle of a jury trial, the defendant should have the right to elect whether to proceed with the trial or accept a mistrial. The defendant should "retain primary control over the course to be followed." *United States v. Scott*, supra, at 94; *United States v. Dinitz*, supra, at 609.

Petitioner objected to the mistrial in his case. He wanted the trial to proceed with the first jury chosen to decide his guilt or innocence. Such was his constitutional right under the Double Jeopardy Clause. Although petitioner's counsel refused to allow petitioner to formally waive his right to conflict-free counsel for purposes of appeal, that right was waived by his deliberate election. By choosing his right to continue the trial after being offered a mistrial based upon his attorney's conflict of interest, the conflict of interest argument was waived for purposes of any later appeal. Compare, *Gori v. United States*, 367 U.S. 364, 365-368 (1961) [By not objecting to a mistrial, defendant has waived his double jeopardy claim.]; *United States v. Ball*, 163 U.S. 662, 671-672 (1896) [Clear rule established that a successful appeal of a conviction waives a subsequent plea of double jeopardy.].

The District Court in petitioner's case accused petitioner of "wanting to have his cake and eat it too" by insisting on proceeding with the trial and yet refusing to formally waive his right to conflict-free counsel. This Court has similarly noted the danger of a trial courts being "whipsawed" by assertions of error whichever way they rule. *Wheat v. United States*, 486 U.S. 153, 161 (1988). The Court also noted, without resolving the problem, that some Courts of Appeal willingly entertained ineffective-assistance claims from defendants who had specifically

waived the right to conflict-free counsel. *Wheat v. United States*, supra, at 162. By granting certiorari in petitioner's case, the Court can put an end to such gamesmanship. The Court could establish a clear rule that a defendant's deliberate election to complete his trial when offered a mistrial based upon attorney conflict of interest waives the attorney conflict of interest issue for purposes of appeal.

A defendant in a criminal case has the right to waive his Sixth Amendment right to counsel. *Faretta v. California*, 422 U.S. 806, 807 (1975). A defendant also has the right to waive his right to conflict-free counsel. *Holloway v. Arkansas*, 435 U.S. 475, 483 n.5 (1978). In *Holloway*, the Court held that "a defendant may waive his right to the assistance of an attorney unhindered by a conflict of interests." Ibid., citing *Glasser v. United States*, 315 U.S. 60, 70 (1942).

This court can eliminate the problem of "whipsawing" trial courts by strengthening the waiver doctrine which is inherent in the "deliberate election" standard of Double Jeopardy. The Court established a comparable bright-line rule involving the issue of waiver resulting from a defendant's assertion of his right of self representation. *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975). In *Faretta*, the Court noted that a defendant may conduct his own defense ultimately to his own detriment. Id. at 834. If this happens, then any issue of ineffective assistance of counsel is waived. The Court stated "Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" *Faretta v. California*, supra, at 834 n.46.

Petitioner urges the court to grant certiorari in this case to adopt the "deliberate election" standard of Double Jeopardy review as the appropriate standard for cases involving attorney conflict of interest issues which arise during trial. *United States v. Scott*, supra, at 93. This will allow the defendant to "retain primary control over the course to be followed." *United States v. Dinitz*, supra, at 609. If an attorney client conflict of interest arises during trial, the defendant may elect to reject a mistrial and finish the trial. If the defendant refuses a District Court's offer of a mistrial, the defendant would thereafter be deemed to have waived the argument on appeal that he was denied his Sixth Amendment constitutional right to conflict-free counsel.[4] Because petitioner elected to proceed with his trial, the District Court's declaration of a mistrial over his objection bars further prosecution of petitioner under the Double Jeopardy Clause.

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[4] In *Wheat v. United States*, 486 U.S. 153, 162 (1988) the Court stated: "we note, without passing judgment on, the apparent willingness of Courts of Appeals to entertain ineffective-assistance claims from defendants who have specifically waived the right to conflict-free counsel." By granting certiorari in petitioner's case, the Court can also address this problem by holding that when the defendant makes a "deliberate election" to be represented by an attorney who has a conflict of interest, the defendant is *deemed* to have also waived the conflict of interest issue for purposes of any later appeal.

CONCLUSION

Based on the foregoing, petitioner urges the Court to grant this petition for writ of certiorari.

Respectfully submitted,

JOSEPH T. VODNOY
JOSEPH F. WALSH

Attorneys for Petitioner
Basho Elliot

2006 WL 2466890

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. BASHO ELLIOT, A.K.A. BOSCH ELLIOT, *Defendant-Appellant.*	No. 04-10571 D.C. No. CR-03-00244-SOM ORDER AMENDING OPINION AND AMENDED OPINION

Appeal from the United States District Court
for the District of Hawaii
Susan Oki Mollway, District Judge, Presiding

Argued and Submitted
November 21, 2005 – Honolulu, Hawaii

Filed April 18, 2006
Amended August 28, 2006

Before: Myron H. Bright,* M. Margaret McKeown,
and Richard R. Clifton, Circuit Judges.

Opinion by Judge Clifton

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* The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

COUNSEL

Joseph T. Vodnoy (argued) and Joseph F. Walsh, Los Angeles, California, for the defendant-appellant.

Edward H. Kubo, Jr., U.S. Attorney, and Beverly Wee Sameshima, Assistant U.S. Attorney (argued), Honolulu, Hawaii, for the plaintiff-appellee.

ORDER

The opinion filed on April 18, 2006, is amended as follows:

Slip op. at 4369, after first full paragraph (after the third full paragraph on 444 F.3d at 1194), before the paragraph which begins "Under these circumstances . . . ," add two new paragraphs:

> Elliot argues now that Hevia could not have been persuaded to waive his rights, that Hevia's testimony was properly stricken, and that had the trial proceeded and resulted in Elliot's conviction, an appeal based on Elliot's conflict would have failed because Elliot could not have demonstrated prejudice. At this point, of course, we do not know whether a conflict-free attorney could have succeeded in retaining Hevia's testimony, either by persuading Hevia to continue with his testimony or by persuading the court not to strike it, but he surely would have tried more than Gordon did.
>
> Moreover, Elliot's current argument understates the argument Elliot would have been able to make on appeal that he had been prejudiced, if the effort to retain Hevia's testimony failed and the trial had continued and resulted in his conviction.

> During his direct examination, Hevia had explicitly waived his rights, but had done so, the district court fairly determined, in apparent reliance upon Gordon. It was Gordon's conflict that caused the court to reopen that subject, resulting in Hevia's subsequent invocation of the Fifth Amendment midway in his testimony. But for Gordon's conflict, it must be presumed that either (1) the court would not have made those inquiries or allowed Hevia to withdraw his waiver, such that Hevia would have testified in full, permitting Elliot to benefit from his testimony, or (2) Hevia would not have testified at all, leading Elliot's attorney to present a different defense, one that was not organized to feature Hevia as Elliot's star witness. Either way, Elliot's defense would have been in much better shape. Instead, Elliot found himself at the end of trial with the witness on whose testimony the defense case was focused suddenly eliminated. A conflict-free attorney would not have put Elliot into that position, to his prejudice, as Elliot surely would have argued on appeal, and it was not unreasonable for the district court to anticipate that such an argument would prevail.

With the opinion as amended, the panel has voted to deny the petition for rehearing. Judge McKeown and Judge Clifton voted to deny the petition for rehearing en banc and Judge Bright so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc, filed May 1, 2006, are DENIED. No further

petition for rehearing and/or petition for rehearing en banc may be filed.

OPINION

CLIFTON, Circuit Judge:

Defendant Basho Elliot is charged with cocaine offenses. At jury trial, during cross-examination of a defense witness, an apparent conflict of interest arose involving Elliot's lead counsel, who appeared to have previously represented one of the defendant's key witnesses in connection with relevant matters. Elliot and his counsel refused to acknowledge whether or not a conflict existed and generally declined to assist the court in its effort to untangle the surprising and unusual situation. At the same time, Elliot insisted upon continuing with the same lawyer and objected to the ordering of a mistrial, while refusing to waive his right to conflict-free representation. After thorough consideration, the district court concluded that the performance of Elliot's counsel was hindered by conflict, and that, if Elliot was convicted, this conflict would make reversal on appeal almost certain. Over Elliot's objection, the district court ordered a mistrial based on manifest necessity. Elliot now contends there was no conflict of interest, and he moved to dismiss, arguing that the Double Jeopardy Clause bars his further prosecution because there was no manifest necessity justifying the mistrial. We disagree and affirm the district court's denial of Elliot's motion to dismiss.

I. Background

In a Federal Express hub in California on May 1, 2003, a narcotics interdiction task force identified a

suspicious package which, after a search warrant was obtained, was found to contain two kilograms (approximately four and one-half pounds) of cocaine. A controlled delivery of the package was arranged. A few days later, an undercover police officer delivered the package to the address on the parcel, which was the home of John Meston in Lahaina, Maui, Hawaii. After receiving the package, Meston then delivered it to Elliot at Elliot's home, also in Lahaina. Shortly thereafter, the police arrested them both. Elliott was indicted and put on trial on two counts alleging violation of 21 U.S.C. §§ 841(a)(1) and 846: one count of conspiracy to distribute and possess with intent to distribute 500 grams or more of cocaine, and one count of attempted possession with intent to distribute 500 grams or more of cocaine.

At Elliot's trial Meston testified as a government witness that Elliot gave him $2,000 to receive the package, as Elliot had done on prior occasions. During the defense case, Sergio Hevia was called as a witness by Elliot to contradict Meston's testimony. In response to an evidentiary objection early in Hevia's testimony, Elliot's lead counsel, Richard Gordon, explained to the district court that he expected Hevia to testify that Meston had himself called Hevia and asked him to mail the package containing the cocaine to Hawaii. The court became concerned that Hevia might be incriminating himself and asked Gordon whether Hevia had an attorney. Gordon replied, in what turned out to be a less than forthcoming fashion, "[n]ot here, no, Your Honor." The district court then informed Hevia of his Fifth Amendment rights and his right to counsel, but Hevia waived his rights, saying he did not want to speak to an attorney. Hevia proceeded to testify that Meston called him and asked Hevia to pick up a box

from a man named Randy and send it via Federal Express. Hevia further testified that he called Meston a few weeks after mailing the package but that Meston sounded strange, telling Hevia that something had happened and not to call anymore.

On cross-examination, Hevia was asked if he ever learned what was in the package. He responded that he found out through attorney Gordon. He testified that a few months after his strange phone call with Meston, he contacted Gordon out of concern over Meston's behavior. He also explained that Gordon had been his attorney in connection with some prior traffic violations.

A discussion then ensued out of the presence of Hevia and the jury. The district court, previously unaware of any attorney-client relationship between Hevia and Gordon, asked Gordon to explain how he had come to represent Elliot in a matter about which he had previously obtained confidential information from and given legal advice to Hevia. Gordon refused to answer the court's questions about his relationship with Hevia. "I don't think I can answer any of that, Your Honor. . . . I think I have issues of confidentiality, and I can't – can't go into that at all." On inquiry by the district court concerning Gordon's apparent simultaneous representation of Elliot and Hevia in the same matter, Gordon admitted that he did not have a written conflict waiver from either Elliot or Hevia.

The court expressed concern that in waiving his rights, Hevia might have been influenced by Gordon's presence, thinking that he had his own counsel present. The value of Hevia's testimony to Gordon was to indicate that Meston, not Elliot, was the organizer of the drug delivery. Since in his capacity as Elliot's defense counsel Gordon

would be encouraging Hevia to make self-incriminating statements, the court indicated that it had become "very concerned" and was inclined to appoint counsel for Hevia.

Hevia returned and the court questioned him about his relationship with Gordon. Hevia testified that he sought legal advice about the parcel at issue in this case when he called Gordon about Meston. Upon hearing this, the court appointed counsel for Hevia.

After consulting with his new attorney, Hevia invoked his Fifth Amendment rights and declined to testify further, which prevented the government from finishing its cross-examination. The court then proposed that Hevia's testimony be stricken due to the lack of cross-examination. Gordon objected on behalf of Elliot, noting that "Mr. Hevia's testimony is relevant and tends to exonerate the defendant." Gordon was unresponsive to the court's inquiries about the basis of his objection or why the court should ignore the fact that the government had not had its chance to cross-examine Hevia. The court called the jury back into the courtroom and struck Hevia's testimony, instructing the jury not to consider it.

At that point, the trial was about to be recessed for four days for a break that had already been planned. Before proceedings ended on the day Hevia's testimony was stricken, Gordon indicated that he would be moving on behalf of Elliot for a mistrial but would research the matter further during the interim. Ultimately, Elliot did not file such a motion. When Elliot opted not to seek a mistrial, the government sent a letter to the court urging it to declare a mistrial sua sponte. On the day before the trial was set to resume, the court faxed a letter to both attorneys posing a series of questions relating to Gordon's

conflict of interest, the effect of striking Hevia's testimony, and the possibility of a mistrial.[1] The government responded to these inquiries, but Gordon did not.

At a conference on the day the trial was to resume, Elliot objected, through his attorney Gordon, to declaration of a mistrial. In sum, Elliot maintained that he wished to continue the trial with Gordon as his counsel, that he was not waiving any of his rights (including the right to conflict-free counsel), and that he was not taking a position as to whether or not Gordon had a conflict of interest. The court extensively questioned Gordon and Elliot regarding the conflict. Gordon stated that Elliot was "not waiving anything" and that he was "reserving all his rights." The court asked specifically whether Elliot was waiving any conflict of interest that Gordon may have created, to which Gordon replied, "Mr. Elliot is specifically not waiving anything."

The court repeatedly inquired as to Elliot's position on whether or not Gordon had a conflict of interest, but Gordon refused to answer the question. The court asked if a potential conflict of interest could justify a mistrial or whether an actual conflict was required, and Elliot refused to take a position on that question, either. The court pointedly asked how Elliot wanted to go forward with the trial if he insisted on exercising his right to conflict-free

[1] The questions asked in part: "Is a mistrial warranted given the particular circumstances before us . . . In the first place, here we have a defense witness, not, as in [government's counsel's] cases, a government witness or someone whose guilt might exonerate the defendant. In the second place, we have a witness whose testimony has been stricken. Please come to tomorrow's proceeding prepared to discuss whether these circumstances affect the advisability of a mistrial."

counsel. Again, Gordon failed to explain his position, which rights Elliot was reserving, and whether Gordon had a conflict. Ultimately, Elliot took no position on whether a conflict existed and what effect, if any, striking Hevia's testimony had on declaring a mistrial.

The court tried to clarify Gordon's position, stating "So you are not admitting nor are you denying that you are in a conflict-of-interest position," to which Gordon replied, "I'm not taking a position; that's correct." The court then expressed concern that Gordon, for his client, "want[ed] [to have his] cake and eat it too." The court continued:

> You want to go forward with the trial. If, in fact, Mr. Elliot is convicted, then Mr. Elliot will then declare that you were in a conflict of interest and take an appeal. This is a waste of the court's time, a waste of valuable jurors' time, and I really feel like there's just a ton of games-playing right now.

The court ultimately concluded that there was manifest necessity for a mistrial, orally declared a mistrial, and discharged the jury. Soon thereafter, the court filed a written order which explained its reasons for declaring a mistrial. The order stated that the court found a manifest necessity to declare a mistrial in order to (1) ensure that Elliot, who had not waived his objection to any conflict of interest, would be represented by conflict-free counsel, (2) avoid the undermining of public confidence in the integrity of the legal system, and (3) avoid a waste of the resources of the court, the jurors, and the parties. It observed that Gordon's obligation to defend Elliot was compromised not only by the conflict presented by his prior representation of Hevia but also by his interest in protecting himself against charges of unethical conduct. The court expressly

noted that Gordon's refusal to respond to the court's inquiries or to take clear positions may have been primarily motivated by a desire to protect himself, to his client's detriment. The order concluded that if the trial proceeded and Elliot was found guilty, he would appeal on conflict-of-interest grounds and a retrial would almost certainly be ordered. The order also noted the court's "overall concern" about the defense case in chief, observing that the testimony of the three allegedly percipient witnesses offered by Defendant was "utterly implausible." If the trial continued, it is apparent that the district court expected it to result in a conviction, especially after the striking of Hevia's testimony.

Gordon thereafter voluntarily withdrew as counsel and Elliot hired a new attorney. A new trial date was set, and Elliot filed a motion to dismiss on double jeopardy grounds. The district court denied the motion to dismiss, concluding that Elliot's arguments had been waived and that there was manifest necessity for declaring a mistrial at Elliot's first trial. Elliot appealed.

II. Discussion

Denial of a defendant's pretrial motion to dismiss an indictment on double jeopardy grounds is immediately appealable as a collateral order under 28 U.S.C. § 1291. *See Richardson v. United States*, 468 U.S. 317, 321 (1984) ("Obviously, [this] aspec[t] of the guarantee's protections would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken. . . . [I]f a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be

reviewable before that subsequent exposure occurs.") (citing *Abney v. United States,* 431 U.S. 651, 662 (1977)); *see also United States v. Hickey,* 367 F.3d 888, 891 (9th Cir. 2004) (reiterating the court's interlocutory appellate jurisdiction over colorable double jeopardy claims).

A. Double jeopardy

The Double Jeopardy Clause of the Fifth Amendment protects a defendant's right not to be placed in jeopardy twice for the same offense. *Arizona v. Washington,* 434 U.S. 497, 503 (1978). In a jury trial, jeopardy attaches when the jury is empaneled and sworn. *See Crest v. Bretz,* 437 U.S. 28, 35 (1978). A criminal defendant has "the right to have the jury first empaneled to try [him] reach a verdict." *United States v. Bonas,* 344 F.3d 945, 947-48 (9th Cir. 2003) (citing *United States v. Bates,* 917 F.2d 388, 392 (9th Cir. 1990)). A jury had already been empaneled and sworn in Elliot's first trial, but that does not mean that another jury can never be empaneled for a retrial. The defendant's right must be subordinate, in some instances, to "the public's interest in fair trials designed to end in just judgments." *United States v. Jorn,* 400 U.S. 470, 480 (1971); *see Thomas v. Municipal Court of the Antelope Valley J.D.,* 878 F.2d 285, 287 (9th Cir. 1989) ("Balanced against the defendant's right, however, is the right of society to be protected against those guilty of crimes by enabling society to retry the accused under certain circumstances.").

When, as here, a mistrial is ordered over a defendant's objection, retrial is permitted only if there was a "manifest necessity" for a mistrial. *Washington,* 434 U.S. at 505. A reviewing court must determine whether such a manifest

necessity existed at the time a mistrial was declared by the district court. In so doing, we should consider that "[t]he words 'manifest necessity' . . . do not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge." *Thomas,* 878 F.2d at 287 (internal quotations omitted). Rather than a strict standard, the Supreme Court has described a general approach to be taken by trial judges considering a mistrial. "If an error would make reversal on appeal a certainty, it would not serve 'the ends of public justice' to require that the government proceed with its proof. . . ." *Illinois v. Somerville,* 410 U.S. 458, 464 (1973).

B. The district court's approach

We have also been directed to consider the manner in which the district court made its decision. "The Supreme Court and appellate courts have relied on four indicators in determining whether the trial court abused its discretion. Has the trial judge (1) heard the opinions of the parties about the propriety of the mistrial, (2) considered the alternatives to a mistrial and chosen the alternative least harmful to a defendant's rights, (3) acted deliberately instead of abruptly, and (4) properly determined that the defendant would benefit from the declaration of mistrial?" *Bates,* 917 F.2d at 395-96. If a district court engages in this type of effort, it is much more likely to have exercised sound discretion in concluding that manifest necessity for a mistrial existed. *See id.* at 396.

We start with the approach taken by the district court, because in this case it weighs very heavily in favor of the court's determination. The court proceeded deliberately

and made every effort to draw out the views of the parties, particularly the defendant, on the situation. Elliot now argues on appeal that there was no conflict of interest, at least not after Hevia's testimony was stricken, and that a reversal of any conviction on appeal was far from a certainty. We do not agree and will deal with those arguments below, but it cannot be overlooked that Elliot did not take those positions at the time, let alone argue for them.

At that point in time it appeared to the district court that Elliot's defense was in disarray, with the testimony of his main witness stricken and his other key witnesses offering testimony which appeared "utterly implausible" to the court. It is not surprising that the court came to conclude that the defense was deliberately covering the risk of an adverse verdict by trying to set up an issue for appeal, an approach which motivated Elliot and his attorney to be unresponsive and unhelpful in dealing with the situation. Nonetheless, the court continued to invite comments and suggestions from Elliot and Gordon, to no avail.

Facing a confusing situation, the court received no help from Elliot and his attorney. If Elliot did not like how the situation was resolved, he must accept responsibility for failing to respond to the court's inquiries when he had the opportunity. The district court's careful and deliberate approach to the problem was laudable and supports its conclusion.

C. Conflict of interest and certainty of reversal

The Sixth Amendment "guarantees each criminal defendant the right to assistance of counsel 'unhindered by a conflict of interests.'" *Thomas,* 878 F.2d at 288 (quoting

United States v. Wheat, 813 F.2d 1399, 1402 (9th Cir. 1987), *aff'd on other grounds,* 486 U.S. 153 (1987)). A conflict of interest can arise in cases of simultaneous or successive representation. *Id.* at 288. Typically, in order to obtain a reversal of conviction a "[d]efendant must show 'that an actual conflict of interest adversely affected his lawyer's performance,'" *United States v. Crespo de Llano,* 830 F.2d 1532, 1540 (9th Cir. 1987) (citing *Cuyler v. Sullivan,* 446 U.S. 335, 348 (1980)).

During cross-examination, Hevia testified that he had sought and received Gordon's legal advice regarding the package at issue in this case. At this point it became clear to the district court that there was, at a minimum, a potential conflict of interest arising from Gordon's successive representation of two clients in the same matter. Hawaii Rule of Professional Conduct 1.9(a) forbids a lawyer who has represented one client in a given matter from representing another client "in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." Assuming Hevia's testimony to be true, Hevia sent the package containing cocaine. Elliot ultimately received it. The best defense available to each of them would be that they did not have knowledge of the package's contents, a defense that would be buttressed by placing the blame on the other. In that way, their interests are clearly adverse. Gordon did not obtain a waiver of this conflict from either Hevia or Elliot.

Even if their interests were not adverse to each other, Gordon's representation of the two clients represented a potential conflict of interest under Hawaii Rule of Professional Conduct 1.7(b), which states that "[a] lawyer shall

not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person . . . unless the client consents after consultation." To represent Elliot adequately, Gordon needed to interview, aggressively examine, and possibly place blame on Hevia, all of which clashed with his attorney-client relationship with Hevia. As such, Gordon's representation of Elliot was arguably limited by his former representation of Hevia in the same matter.

The striking of Hevia's testimony was clearly prejudicial to Elliot. The loss of Hevia's testimony prevented the jury from considering evidence that contradicted the government's star witness, Meston. Hevia formed the backbone of Elliot's defense, and his absence greatly diminished whatever prospects there were for an acquittal. Clients should expect their lawyer to "use every skill, expend every energy, and tap every legitimate resource in the exercise of independent professional judgment on behalf of the client and in undertaking representation on the client's behalf." *Thomas,* 878 F.2d at 289. Had Elliot been represented by conflict-free counsel, his attorney could have spent considerable efforts ensuring that Hevia testified. A diligent attorney would have done all in his power to keep Hevia on the stand.

But Gordon was not in a position to do that. By that time, he had his own problem, in the form of his apparent violations of the rules of professional conduct, and that represented still another conflict with his obligation to Elliot. Perhaps concerned about concealing his own misconduct, Gordon did not diligently attempt to prevent the court from striking Hevia's testimony. He objected but refused to address the court's concerns when stating his

objection. The Supreme Court has stated that the attorney is in the best position to determine when a conflict exists and so "defense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem." *Holloway v. Arkansas,* 435 U.S. 475, 485-86 (1978). Gordon did not do so. To the contrary, by refusing to acknowledge the problem or to respond to the district court's efforts to address the situation, Gordon effectively provided Elliot with another ground for appeal, since it is hard to avoid the inference that Gordon was motivated in substantial part by his own self-interest in protecting himself, in conflict with Elliot's best interests.

Elliot argues now that Hevia could not have been persuaded to waive his rights, that Hevia's testimony was properly stricken, and that had the trial proceeded and resulted in Elliot's conviction, an appeal based on Elliot's conflict would have failed because Elliot could not have demonstrated prejudice. At this point, of course, we do not know whether a conflict-free attorney could have succeeded in retaining Hevia's testimony, either by persuading Hevia to continue with his testimony or by persuading the court not to strike it, but he surely would have tried more than Gordon did.

Moreover, Elliot's current argument understates the argument Elliot would have been able to make on appeal that he had been prejudiced, if the effort to retain Hevia's testimony failed and the trial had continued and resulted in his conviction. During his direct examination, Hevia had explicitly waived his rights, but had done so, the district court fairly determined, in apparent reliance upon Gordon. It was Gordon's conflict that caused the court to reopen that subject, resulting in Hevia's subsequent invocation of the Fifth Amendment midway in his

testimony. But for Gordon's conflict, it must be presumed that either (1) the court would not have made those inquiries or allowed Hevia to withdraw his waiver, such that Hevia would have testified in full, permitting Elliot to benefit from his testimony, or (2) Hevia would not have testified at all, leading Elliot's attorney to present a different defense, one that was not organized to feature Hevia as Elliot's star witness. Either way, Elliot's defense would have been in much better shape. Instead, Elliot found himself at the end of trial with the witness on whose testimony the defense case was focused suddenly eliminated. A conflict-free attorney would not have put Elliot into that position, to his prejudice, as Elliot surely would have argued on appeal, and it was not unreasonable for the district court to anticipate that such an argument would prevail.

Under these circumstances, the district court correctly determined that Gordon had one or more conflicts of interest that prevented him from properly representing Elliot. "Few aspects of our criminal justice system are more vital to the assurance of fairness than the right to be defended by counsel, and this means counsel not burdened by a conflict of interest." *United States v. Henke,* 222 F.3d 633, 638 (9th Cir. 2000) (per curiam). The district court reasonably concluded that such a conflict, if raised by Elliot on appeal, would have made reversal of any conviction almost certain.

D. Manifest necessity for a mistrial

Rather than hastily declaring a mistrial, the district court made every effort to resolve the conflict and continue the trial. The court asked Elliot numerous times if he

wanted to waive any conflict of interest and continue with Gordon as counsel. Elliot responded, through Gordon, that he was "not waiving anything" and reserving "all" of his rights, even as he insisted upon keeping Gordon as his lawyer. The district court spent considerable time explaining to Elliot why it believed there was at least a potential conflict of interest. Even after the warnings of the court, though, Elliot would take no position on whether a conflict existed and expressly would not waive his right to contest any conflict on appeal.

We agree with the assessment of the district court that Elliot was trying to have it both ways. If the trial continued and Elliot was found guilty, he would have had a built-in issue for appeal, namely, that he had been denied his right to conflict-free representation. *See Thomas,* 878 F.2d at 290. Conversely, if a mistrial was declared he would, as he does now, claim that there was no conflict that necessitated a mistrial. This court has warned that "[w]e should be aware of the trial court's prospects of being 'whip-sawed' by assertions of error no matter which way it rules." *Id.* This was exactly the prospect facing the district court in this case.

The district court did not err in determining that there was manifest necessity for the mistrial, given Gordon's conflict of interest and Elliot's attempt to have it both ways. *See United States v. Sammaripa,* 55 F.3d 433, 435 (9th Cir. 1995) ("[W]hen the breakdown between attorney and client becomes apparent *after* jeopardy attaches, there is manifest necessity to declare a mistrial.") (citing *Thomas,* 878 F.2d at 288 n. 2).

We have held that manifest necessity existed for a mistrial under similar circumstances. In *Thomas,* an

attorney defended a husband charged with criminal assault and battery of his wife. 878 F.2d at 286. The attorney had previously represented the wife in her divorce from a former husband. *Id.* One of the husband's primary defenses was that the wife fabricated the assault charges in retaliation for allegations by the husband that the wife was a bigamist, having married him before her divorce from her first husband became final. In a discussion in chambers, the lawyer admitted that he had represented the wife in the prior divorce. The attorney denied the existence of a conflict and offered to abandon the bigamy motive. Because the husband refused to waive the conflict and would not agree to a mistrial, the trial court, as in the present case, declared a mistrial sua sponte. At retrial, the husband claimed that double jeopardy barred his further prosecution because there was no manifest necessity for a mistrial. We held that the lawyer had "divided loyalties which could adversely affect his ability diligently to defend" the husband, and "[h]ad the trial court simply proceeded with the trial, reversible error would have been built in because . . . [the husband] . . . did not have effective, conflict-free representation." *Id.* at 290. Due to the evident conflict of interest resulting from the husband's counsel's inability to adequately defend him (having lost the bigamy motive), and the husband's refusal to waive the conflict or agree to a mistrial, we concluded that the district court did not err in declaring a mistrial. *Id.*

In the present case the district court was placed in the same position by Elliot and Gordon. Faced with conflicts that had hindered Gordon's ability to adequately represent Elliot, and with Elliot's refusal to waive the conflict while insisting on continuing with Gordon as his lawyer, the

district court concluded appropriately that there was manifest necessity for a mistrial.

III. Conclusion

Faced with an evident conflict of interest and a defendant apparently attempting to manufacture an issue for appeal, the district court did not err in finding manifest necessity for a mistrial. Elliot insisted upon continuing with Gordon as his lawyer but would not agree to a waiver of the conflicts faced by Gordon. The district court took great care in addressing the situation. It was a "scrupulous exercise of judicial discretion" which led it "to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." *Jorn,* 400 U.S. at 485. In order to preserve Elliot's right to conflict-free representation, to save valuable time and resources of the court and the jurors, and to serve the ends of public justice, the district court was justified in declaring a mistrial. Elliot's motion to dismiss was properly denied, and he may be tried on the pending charges.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiffs, vs. BASHO ELLIOT, aka "Bosch Elliot," Defendant.	CR. NO. 03-00244 SOM ORDER DENYING MOTION TO DISMISS ON DOUBLE JEOPARDY GROUNDS (Filed Oct. 1, 2004)

ORDER DENYING MOTION TO DISMISS ON DOUBLE JEOPARDY GROUNDS

I. INTRODUCTION.

Defendant Basho Elliot moves for dismissal of this drug case on the ground that any trial would place him in double jeopardy. Previous trial proceedings ended in a mistrial before the evidence closed. During the cross-examination of Sergio Hevia, a defense witness, the court learned that Hevia had been represented by Elliot's lead trial counsel, who was then Richard Gordon, an out-of-state attorney who had been admitted pro hac vice. When Hevia invoked his Fifth Amendment right and declined to answer further questions on cross-examination, the court struck all of Hevia's testimony. The Government urged the court to declare a mistrial, but Elliot argued that the trial should proceed with the same lead trial counsel. Elliot declined to admit, deny, or waive any conflict and announced that he was not waiving any right, including his right to representation by conflict-free counsel. Concluding that Elliot was attempting to preserve an appellate issue if

convicted at trial, the court also expressed concern that Gordon might be more interested in protecting himself against charges of unethical conduct than in advocating on Elliot's behalf. The court declared a mistrial based on manifest necessity, which Elliot now challenges on grounds never raised previously.

The court denies Elliot's motion to dismiss on the grounds that (1) Elliot waived the arguments he now makes, and (2) even if the court considers the arguments, it was manifestly necessary to declare a mistrial.

II. BACKGROUND FACTS.

This case stems from the sending of a Federal Express parcel containing about four and a half pounds of cocaine from California to Hawaii.

At trial, Frank Herbert, a special agent supervisor with the California Department of Justice, testified that, on May 1, 2003, he was at the Federal Express hub in Van Nuys, California. *See* Testimony of Frank Herbert (April 8, 2004) at 3-42 to 3-44 (transcript citations begin with the volume and are followed by specific page numbers). Herbert saw a heavily taped, new box with a handwritten airbill. The box was addressed to Adam Stevens, at 116 Kanunakea Street in the town of Lahaina on the Island of Maui, Hawaii, and the sender had paid $131 to ship it. *Id.* at 3-45 to 3-46. Herbert called the phone number of the listed shipper, Marcus Santas, only to be told that no one at that phone number had that name. *Id.* at 3-48. Herbert, suspicious that the package contained contraband, contacted the Drug Enforcement Administration's Honolulu Airport Task Force to arrange for a controlled delivery of the parcel. *Id.*

The DEA Airport Task Force in Honolulu accepted the package, obtained a search warrant to search its contents, and found what appeared to be two kilograms of cocaine. *See* Testimony of Russell Woodward (April 8, 2004) at 3-78, 3-81 to 3-82, 3-85 to 3-86. The material was sent to the DEA's Southwest Laboratory in San Diego, which confirmed that the substance from the parcel was 2,003 grams, or approximately four and a half pounds, of 87% pure cocaine. *See* Testimony of Dean Kirby (Apr. 9, 2004) at 4-66.

In the meantime, the agents in Honolulu had rewrapped the box, replacing the cocaine with a substance that looked like cocaine. A beeper was installed in the box that allowed the officers to track it and know when it was opened. The inside of the box and the package of fake cocaine were dusted with Sirchie powder. *See* Testimony of Damien Mediola (April 9, 2004) at 4-76 to 4-79. The Sirchie powder, visible only under ultraviolet light, was intended to help identify persons who touched the inside of the box or the package of fake cocaine. Testimony of Richard Jones (Apr. 9, 2004) at 4-102.

A law enforcement officer posing as a Federal Express delivery driver then delivered the box to the address on the parcel, 116 Kapunakea Street. *Id.* at 4-79. He told a person at that address that he had a parcel for Adam Stevens, the person to whom it was addressed. *Id.* at 4-81. A woman signed for the box, and the officer left it in the garage area. *Id.* at 4-83 to 4-84; Woodward Testimony at 3-100.

The chief Government witness was a cooperating codefendant, John Theodore Meston. Meston lives at 116 Kapunakea Street, the address on the box. *See* Testimony

of John Theodore Meston (April 9, 2004) at 4-205. According to Meston, Elliot used to be his neighbor on Kapunakea Street. Meston Testimony at 4-207 to 4-208. Both men earned money by catching and selling fish and sometimes worked together. *Id.* at 4-205, 4-209. Meston testified at trial that, sometime in 2002, Elliot had asked him to receive a package for him in exchange for money. *Id.* at 4-210. Meston said that Elliot gave him $1,500 for the first package Meston received for Elliot. *Id.*

Meston testified that he received $2,000 from Elliot for the second and third packages he received for Elliot. *Id.* at 4-214 and 4-218. Another package, the one in issue in this case, arrived on May 6, 2003, a day that Meston also claims to have had some fresh fish to deliver to Elliot. Meston said that he put the package in the car and drove it to Elliot's house to deliver along with the fish. *Id.* at 4-222. Meston said that Elliot never provided details of what was in the packages, instead cautioning Meston that the less Meston knew about the contents of the packages, the better off Meston would be. *Id.* at 4-210.

Meston testified that, when he got to Elliot's house with the parcel, Elliot said, "Let's go in the back and I'll give you your money." *Id.* at 4-223. The men then moved from the residence to a structure in the back of the property that Elliot used for shaping surfboards. Meston testified that, in the shaping room, Elliot expressed concern that something was amiss with the tape on the parcel. According to Meston, Elliot then called someone named "Andy" on Elliot's cell phone. *Id.* at 4-224. Meston said that Elliot then opened the parcel, picked up the cellophane bag inside, and threw it at Meston, saying, "It feels really light." *Id.* at 4-225.

Meston testified that Elliot made another telephone call, mentioning weight during the call. There was then a knock at the door. *Id.* 4-226. It was the police, who arrested Meston and Elliot. *Id.* 4-227. Meston testified that, after he was arrested, Elliot apologized to him several times about what had happened. *Id.* at 4-230.

DEA Special Agent Richard Jones was part of the team that arrested Meston and Elliot. *See* Testimony of Richard Jones (Apr. 9, 2004) at 4-92. Jones testified that the surveillance team went to the shaping room after the beeper in the parcel went off. *Id.* at 4-97. He testified that he could see the opened parcel and its contents in the room through the door that Elliot opened. *Id.* at 4-98. Elliot and Meston were both tested for the Sirchie powder that agents had put on the contents of the parcel, and ultraviolet light revealed Sirchie powder on Elliot's hands, face, and the front of his shorts, indicating that Elliot had touched the contents of the parcel. *Id.* at 4-102; Testimony of Honolulu Police Department Detective Tanya Tano (Apr. 9, 2004) at 4-178 to 4-179. Sirchie powder was also detected on Meston's hands. Tano Testimony at 4-178.

At trial, Meston admitted to the jury that he had "pled guilty to doing a favor for Basho Elliot." *Id.* at 4-206.

On cross-examination, Meston testified that he had quitclaimed his interest in real property to three people. *See* Meston Testimony at 5-90 to 5-91. Elliot's position was that this quitclaim was in lieu of payment for the drugs lost when the Government seized the parcel that Meston had taken to Elliot's home. Elliot therefore made the point that the quitclaim was evidence that Meston was more involved with the drug scheme than his direct testimony had suggested. Meston denied that this quitclaim deed

was related to cocaine. *Id.* at 5-91 to 5-92. On redirect, Meston explained that he had originally signed a mortgage on the property only so that the inclusion of his income would help his girlfriend and her family to qualify for a loan with which to purchase the property. He testified that, when that family wanted to refinance the loan, the family did not need him on title to qualify for the loan, and he therefore quitclaimed his interest in the property. *Id.* at 5-123 to 5-124.

DEA Special Agent Jones testified that agents recovered $16,900 from a safe in Elliot's house. Jones Testimony at 4-116. Jones testified that Elliot's 2002 tax return indicated a total income of $11,867 and an adjusted gross income of $13,921 for 2001. He testified that Elliot's wife's 2002 tax return indicated a total income of $5,619. *Id.* at 4-128.

Detective Tano testified that, while Elliot was waiting to be transported off his property, Elliot told her that "he was so stupid to do this." Tano Testimony at 4-181. According to Tano, Elliot explained that he had been trying to "take the easy way because his father had helped him buy the property and he had a hard time making the mortgage." *Id.* at 4-182.

DEA Special Agent Gerald Lawson was qualified as an expert in the modus operandi of drug traffickers, specifically with respect to the manner in which parcels are used for delivering drugs, as well as distribution activities and the value of drugs. *See* Testimony of Gerald Lawson (April 13, 2004) at 5-172. Lawson testified that drug traffickers often send packages containing illegal narcotics to relatives' or other associates' houses using fictitious names. He said that a drug trafficker would then go to the house to

pick up the parcel. Lawson testified that drug traffickers use this procedure in an attempt to distance themselves from parcels of drugs and to evade detection by law enforcement. *Id.* at 5-175.

Elliot presented an aggressive defense at trial. In an attempt to impugn Meston, Elliot called an expert witness, Frank Panessa, a retired DEA agent, who opined that Meston's quitclaim appeared to be payment for the seized drugs, that the purity of the cocaine was too high to be suitable for sale on the street, that Elliot should have had more cash in his house if he were a drug dealer, and that the absence of drug paraphernalia and equipment on Elliot's property suggested that he was not a drug dealer. *See* Testimony of Frank Panessa (April 15, 2004), at 7-16 to 7-25.

Elliot also called as a witness his father, Michael Elliot, who testified that he and his friend, Barbara Arens, provided financial support to Elliot. For example, Michael Elliot said that Arens had purchased a diamond engagement ring from Tiffany's for Elliot to give to his then-girlfriend when he proposed marriage. *See* Testimony of Michael Elliot (April 14, 2004) at 6-83. Michael Elliot testified that he was the source of the cash found in Basho Elliot's house, and that the money was intended for home renovations and repairs and for emergencies. *Id.* at 6-87. The defense offered as exhibits selected pages of bank statements that did not include the name of the account holder. Michael Elliot testified that withdrawals shown on those pages represented cash withdrawals he had made of money he delivered to his son. The documents did not appear to the court to be authentic, and the court declined to admit them, noting out of the presence of the jury that the documents appeared to have been doctored. *Id.* at 6-127

to 6-140. In connection with the present motion, the Government has stated that it believes the documents are indeed authentic. *See* United States of America's Memorandum in Opposition to Defendant Basho Elliot's Motion to Dismiss Indictment (Sept. 17, 2004) at 4 n.3.

Michael Elliot's testimony about providing money to Basho Elliot was corroborated by Basho Elliot's wife. *See* Testimony of Liane Curtiss (April 14, 2004) at 6-169 to 190.

Elliot then called two witnesses to undercut Meston's testimony directly. Frankie Vargas took the witness stand to explain the telephone calls that Elliot made the day he was arrested. The Government's position had been that the calls were related to Elliot's drug activity. Vargas testified that he lived in California and was using a cell phone that day to which Elliot, calling from Hawaii, placed several calls. Vargas identified himself as the brother of Elliot's former girlfriend and explained that the phone had been supplied by the owner of the restaurant at which he worked as a sous chef. *Id.* at 7-59 to 7-60. Vargas testified that, on the day Elliot was arrested, Elliot made several telephone calls to him relating to surfing equipment. Vargas testified that he took one call that day even while working at the height of the dinner rush. *Id.* at 7-66 to 7-68. He said cocaine was not mentioned at all during the phone calls. *Id.* at 7-68. Vargas testified that the first call on May 6 had to do with the status of a surfboard. *Id.* at 7-82 to 7-83. Six minutes later, Vargas said, he had another telephone conversation with Elliot in which they just talked. *Id.* 7-83. Vargas also testified that, several hours after that, they conversed "about small talk, surfing, the [surfing] planer," and matters similar to those covered in the conversations earlier that day. *Id.* at 7-84 to 7-85.

This volume of calls between Vargas and Elliot on May 6, 2003, was higher than normal, as Vargas said they had only spoken "maybe ten" times from April to December 2003.

The main defense witness was Sergio Hevia. Hevia, who lives in California, testified that he had met Meston a few years earlier while vacationing on Maui. *See* Testimony of Sergio Hevia (April 15, 2004) at 7-89. In response to an evidentiary objection, Gordon, Elliot's attorney, made a proffer out of the hearing of the jury, explaining that he expected Hevia to testify that Meston, far from being just a "maildrop" for Elliot, had actually been the one who had called Hevia and asked Hevia to mail the parcel containing drugs from California to Hawaii. *Id.* at 7-95 to 7-96. Given this proffer, the court became concerned that Hevia might be implicating himself in the very crime at issue in this case.

The court then asked Gordon whether Hevia had an attorney. Gordon replied, "Not here, no, Your Honor. No he doesn't." *Id.* at 7-109. This statement turned out to be not entirely forthcoming.

In a discussion with the court about whether Hevia's Fifth Amendment rights would be implicated by Hevia's testimony, Gordon claimed that Hevia had not known and had had no reason to suspect that the package contained illegal drugs. *Id.* at 7-110. The court nevertheless informed Hevia of his Fifth Amendment rights and of his right to counsel. *See id.* at 7-112 to 7-113. Hevia waived his rights, saying that he was prepared to answer questions and did not want to speak to an attorney. *Id.* at 7-113 to 7-114.

On direct examination, Hevia testified that Meston had called him and asked him to pick up a box from a guy

named Randy and to send it via Federal Express. *Id.* at 7-121 to 7-122. Hevia said that he agreed to do that, knowing nothing about what was in the box and not suspecting that anything was amiss. *Id.* at 7-122. Hevia said that he picked up the package from Randy and that Randy gave him $100 to mail it. *Id.* at 7-123. Hevia testified that it cost a little more than $100 to mail it; Hevia said he unquestioningly paid the difference himself. *Id.* at 7-124. According to Hevia, he called Meston a few weeks after he mailed the package. Hevia testified that Meston sounded strange over the phone and told Hevia that something had happened, that Hevia should not call him anymore, and that Meston would call Hevia instead. *Id.* at 7-125.

On cross-examination, Hevia reiterated that he had met Meston while vacationing on Maui. However, when questioned about the details of the vacation, Hevia said he did not remember the name of the hotel he had stayed at, the last names of the people with whom he had traveled to Hawaii, or even the city on Maui that he was visiting. *Id.* at 7-130 to 7-133, 7-136. Hevia testified that, after he got the package from Randy, he took it to a place similar to Mailbox, Etc., to mail. *See id.* at 7-175. Asked whether he ever learned what was in the package. Hevia responded that he eventually found out through Gordon. *Id.* at 7-180. Hevia explained that, a few months after his strange phone call with Meston, he contacted Gordon out of concern about Meston's behavior on the phone. *Id.* at 7-181 to 7-182, 7-184. Hevia explained that Gordon had been his attorney in connection with some traffic violations. *Id.* at 7-184 to 7-185.

A discussion out of the hearing of both Hevia and the jury followed. The court, which had not previously known that there was any attorney-client relationship between

Hevia and Gordon, questioned Gordon about his relationship with Hevia. *Id.* at 7-191. Gordon answered, "I don't think I can answer any of that, Your Honor. I don't think I'm permitted to. I think I have issues of confidentiality." *Id.* at 7-192. The court expressed concern that, in earlier waiving his rights, Hevia may have been influenced by the presence of someone he thought he could look to for legal advice. Thus, he may have waived his right to counsel thinking he had counsel present in the form of Gordon. *Id.* at 7-192 to 7-193. The court asked Gordon whether he had written conflict waivers from both Elliot and Hevia, and Gordon said he did not. *Id.* at 7-194.

With the jury still absent, the court then brought Hevia back to the witness stand and questioned him about whether Gordon was his attorney. Hevia testified that Gordon had represented him with some traffic matters and that, when he called Gordon about Meston, he was seeking legal advice pertaining to the parcel at issue in this case. *Id.* at 7-196. Upon hearing this, the court appointed counsel for Hevia. *Id.* 7-196, 7-208, 7-211 to 7-212. After consulting with his newly appointed counsel, Hevia invoked his Fifth Amendment rights. *Id.* at 7-216 to 7-217. This invocation prevented the Government from completing its cross-examination of Hevia. Again out of the jury's presence, the court then discussed with counsel the court's proposal to strike all of Hevia's testimony in light of the lack of full cross-examination. Gordon objected, saying that Hevia's testimony was relevant and tended to exonerate Elliot. However, despite repeated questioning by the court, Gordon refused to explain why that meant that Hevia's testimony should be allowed to stand in the absence of an opportunity for the Government to cross-examine. *Id.* at 7-218 to 7-221.

Unsatisfied with Gordon's statements, the court called the jury back into the courtroom, struck Hevia's testimony, and instructed the jury not to consider it. *Id.* at 7-223. At the hearing on the present motion, Elliot's new counsel has agreed that it was proper to strike Hevia's testimony under the circumstances.

After the court struck Hevia's testimony, the defense rested, and there was brief rebuttal evidence. At the end of the trial day, which was Thursday, April 15, 2004, the Government indicated that it would continue with its rebuttal evidence on the next trial day. The next trial day was scheduled to be the following Tuesday, April 20, 2004, as the trial judge was scheduled to attend the district's annual conference on Friday, April 16, 2004, and the next Monday, April 19, 2004, had been reserved for the court's usual motions and sentencing calendar. Thus, there would be a gap of four days before the trial could resume.

Before proceedings ended that Thursday, April 15, 2004, Gordon announced that he would be moving for a mistrial, but that he wanted to spend the weekend researching the issues before making the motion. *Id.* at 7-223 to 7-224. The court offered the attorneys a time on Monday, April 19, 2004, to hear Elliot's motion for mistrial. Ultimately, however, Elliot decided not to file such a motion.

Some time before April 20, 2004, local counsel for Elliot, Philip H. Lowenthal, alerted the courtroom manager that he would be filing a motion to withdraw as counsel, which he in fact filed on April 20, 2004. In support of his motion, Lowenthal attached his declaration, stating, "I am informed and believe that the record, (although I

was not physically in the courtroom) indicates at least the appearance of a conflict of interest for Richard Gordon arising out of representation of both Defendant Elliot and witness Sergio Hevia." Declaration of Philip H. Lowenthal (April 19, 2004) ¶ 4. He further stated, "Assuming the testimony of Mr. Hevia to be true, in my opinion, Mr. Gordon's undisclosed dual representation contributed to the loss to Defendant Elliot of vital evidence essential to the theory of his defense." *Id.* 15.

While Elliot opted not to seek a mistrial, the Government sent a letter to the court urging it to declare a mistrial. No proceedings were held on April 19, 2004, but the court scheduled a conference with the attorneys and parties for 8:30 a.m. on Tuesday, April 20, 2004, before the jury was scheduled to convene for the continuation of the rebuttal evidence. The court faxed a letter to the attorneys on April 19, 2004, in which the court asked the attorneys to address the following:

> 1. Is a mistrial warranted given the particular circumstances before us? Ms. Sameshima's letter refers to cases that involve circumstances different from those before us. In the first place, here we have a defense witness, not, as in Ms. Sameshima's cases, a government witness or someone whose guilt might exonerate the defendant. In the second place, we have a witness whose testimony has been stricken. Please come to tomorrow's proceeding prepared to discuss **(and to cite authorities concerning)** whether these circumstances affect the advisability of a mistrial. I would appreciate correspondence from counsel no later than 4 p.m. identifying case authorities that will be relied on. Letters may be faxed to me (with copies of the

> letters to opposing counsel) at 541-1724. Cases need not be attached to the letters.
>
> 2. Would Mr. Elliot object to the declaration of a mistrial?
>
> 3. Is Mr. Elliot now waiving any possible conflict of interest or other potential problem associated with Mr. Gordon's representation of Mr. Hevia? The court suggests that, before deciding on any waiver, Mr. Elliot consult not only with Mr. Gordon on this point, but also separately with Mr. Lowenthal.
>
> 4. What is Mr. Elliot's position on Mr. Lowenthal's motion to withdraw as counsel? Defense counsel should discuss this matter with Mr. Elliot. If Mr. Elliot would like to consult with independent counsel, he should so inform me at tomorrow's conference.

See Letter from this court to counsel (April 19, 2004), attached as Exhibit A to Government's Memorandum in Opposition to Motion to Dismiss Indictment, filed on September 17, 2004.

At the conference on April 20, 2004, the Government, while refraining from itself moving for a mistrial, urged this court to declare a mistrial *sua sponte*. *See* Transcript of Proceedings (April 20, 2004) at 8-6 to 8-8. Elliot objected to a declaration of mistrial. *Id.* at 8-8. The court then told Elliot, and made sure Elliot understood, that he had a right to conflict-free counsel and that Gordon might or might not have a conflict of interest. The court explained that such a conflict could mean that Gordon was not representing Elliot with all of the zeal that Gordon should be employing, as Gordon might have been restrained by loyalty to Hevia. *Id.* at 8-8 to 8-12.

The court then extensively questioned Gordon and Elliot regarding the questions posed in its April 19 letter. Through his counsel, Gordon, Elliot indicated that he was opposing his local counsel's motion to withdraw. *Id.* at 8-14. Elliot insisted on keeping both Gordon and Lowenthal as his trial attorneys, was not waiving any conflict, and was objecting to a mistrial. *Id.* at 8-14 to 8-15.

The court asked the parties whether an actual conflict or only a potential conflict was required to justify a declaration of mistrial. *Id.* at 8-16. The Government argued that, given the state of the record, the court could never know whether, because of his apparently conflicting loyalties, Gordon had failed to explore a number of questions with Hevia on direct examination that would have helped Elliot. The Government pointed out that, because Elliot was refusing to take a position on whether there was or was not a conflict, the court was being "whipsawed." That is, if the trial continued and Elliot were convicted, Elliot would have a built-in appellate issue based on the lack of conflict-free counsel. If the court declared a mistrial, Elliot would argue that his double-jeopardy rights were being violated. *Id.* at 8-17 to 8-18.

Elliot took no position on whether an actual conflict was required for a mistrial, or whether a potential conflict sufficed. Similarly, Elliot was silent on the question posed by the court's letter concerning the effect, if any, of the court's striking of Hevia's testimony on the issue of whether a mistrial should be declared.

The court specifically asked Elliot whether, if the trial proceeded, Elliot's position was that his counsel would be free of conflict. Gordon responded: "Mr. Elliot has not waived that." *Id.* at 8-18. When the court pointed out that

it had asked a yes or no question, Gordon stated: "Yes, I understand it's a yes-or-no question. That doesn't mean that, as Mr. Elliot's attorney, I don't get to stop and think and try to phrase an answer that is in my client's best interest." *Id.* The court then asked for a yes or no answer, to which Gordon responded, "Your Honor, Mr. Elliot has not waived anything. He has not made a statement consistent with the premise in your question." *Id.* at 8-18 to 8-19.

Gordon repeated this response to additional questions posed by the court as to the existence of a conflict. The court asked, "So he is taking no position on whether you have or do not have a conflict of interest. Am I correct?" Gordon replied, "His position is that he's not waiving it and that he's specifically reserving all his rights." *Id.* at 8-19. The court pointed out that Gordon was not answering the question about what Elliot's position was with respect to whether there was or was not any conflict. Gordon continued to refuse to explain, saying only, "He has no position further than what has been articulated." *Id.* at 8-20.

The Government then argued that it believed that Gordon's conduct demonstrated that he did indeed have a conflict and that his actions were that of an attorney trying to cover "his own tail." *Id.* at 8-21 to 8-22. The court once again asked Gordon whether he had a position as to the existence of a conflict:

> THE COURT: ... Now I'm asking for your statement on behalf of yourself.
>
> MR. GORDON: I'm not taking – I have not taken a position, if that's what you asked.

THE COURT: Okay. So you are not admitting nor are you denying that you are in a conflict-of-interest position.

MR. GORDON: I'm not taking a position; that's correct.

THE COURT: Right. So, if you're not taking a position, you are neither admitting nor denying that you are in a conflict of interest position. If you are not denying that you have a conflict of interest, then I feel that there is a grave cloud over your continuing to represent a client.

First of all, you're not denying there's a conflict. Second, he's not waiving any possible conflict. This seems to me that you want your cake and eat it too. You want to go forward with the trial. If, in fact, Mr. Elliot is convicted, then Mr. Elliot will then declare that you were in a conflict of interest and take an appeal. This is a waste of the court's time, a waste of valuable jurors' time, and I really feel like there's just a ton of games-playing right now.

Id. at 8-22 to 8-23.

Given this background, the court then stated:

There seems to me to be a conflict of interest, at least a potential one, between Mr. Hevia and Mr. Elliot, both of whom are represented by Mr. Gordon. There seems to me also now to be a problem between Mr. Gordon's protecting himself and Mr. Gordon's duty to represent Mr. Elliot vigorously. Mr. Lowenthal has already indicated that he wishes to withdraw and does not feel he can go forward under these circumstances. That would mean then that to be entitled – to be [assured] of conflict-free representation Mr. Elliot

> would have to get a new attorney. Such a new attorney could not come into this trial in the middle of it and proceed in any way that would make sense while we kept the same jury. Under those circumstances I think there is a manifest necessity for a mistrial, and I see no way out of it.
>
> Would anyone like to be heard before I make a final ruling? I'm happy to hear from either side on positions, on arguments, or on alternatives.

Id. at 8-24 to 8-25. Neither party made any further statement. *Id.* at 8-25.

The court then orally declared a mistrial and discharged the jury. *Id.* at 8-27. A written order followed. This order was prepared quickly by the judge herself, without briefing by the parties. The court was attempting to memorialize its thought process and to state the circumstances before time made them unclear. The court also wanted to get the order out as quickly as possible in case Elliot wanted to retain new counsel. It was the court's thought that a written order would assist new counsel in understanding what had happened and in determining whether to enter the case. The court did not want new counsel to have to rely on reports by Gordon or by Elliot, and transcripts of trial proceedings and the April 20 hearing might not have been immediately available.

In its written order, the court stated:

> This court declares a mistrial in this drug case, having found a manifest necessity to do so for the purposes of (1) ensuring that Defendant Basho Elliot, who has not waived his objection to any conflict of interest, is represented by conflict-free counsel, (2) avoiding the undermining of public confidence in the integrity of the legal

> system, and (3) avoiding a waste of the resources of the court, the jurors, and the parties. The court finds that the ends of public justice would not be served by continuing the proceedings. *See United States v. Jorn*, 400 U.S. 470, 485 (1971). If this trial proceeded and Defendant were found guilty, Defendant would undoubtedly appeal on the ground that his counsel had a conflict of interest that made any judgment unjust, and a retrial would almost certainly be ordered. Under those circumstances, the present trial should not proceed. *See Illinois v. Somerville*, 410 U.S. 458, 463 (1973).

Order Declaring Mistrial (April 21, 2004) at 1.

The court noted that it was faced with the following six circumstances:

> 1. lead defense counsel had at least a potential conflict of interest, which the court outlined for Defendant; 2. local defense counsel was seeking to withdraw and was, in any event, not prepared to proceed with the trial without lead defense counsel; 3. Defendant was preserving all his rights, including his right to be represented by conflict-free counsel (that is, Defendant was not waiving any conflict of interest); 4. Defendant was insisting on being represented at trial by lead defense counsel, even in the face of a potential conflict of interest; 5. Defendant was objecting to a mistrial; and 6. lead defense counsel himself was not denying that he had a conflict of interest. The court concluded that, in objecting to a mistrial under the preceding circumstances, Defendant was trying to force a retrial if a conviction resulted.

Id. at 5-6.

The court concluded:

> During the discussion of a possible mistrial, if lead defense counsel thought that Defendant had not been adversely affected by any perceived conflict, lead defense counsel had every reason to argue that point vigorously. He made no such argument. Instead, he only repeated that Defendant was preserving all his rights, declining elaboration. Either lead defense counsel did not recognize the problem, or he did recognize it but was protecting himself or trying to preserve an appellate issue by simply refusing to explain the basis of his position. [Footnote omitted.] As long as Defendant is represented by lead defense counsel, Defendant is either being influenced by counsel who cannot or will not clarify the problem, or Defendant, on the advice of that counsel, is playing games for strategic advantage. A trial under those conditions would be a travesty.

Id. at 10.

Although the court's written order did not expressly state that Hevia had committed perjury or that Gordon had suborned perjury by offering Hevia's testimony, the order clearly conveyed the court's concern that Hevia's testimony was implausible. It was, after all, a nearly inconceivable coincidence that Hevia would call an attorney to discuss concerns about Meston, and that the attorney Hevia called would be trial counsel in a case in which the opposition's main witness was Meston. It was similarly highly implausible that Hevia could not remember basic details, such as the names of the friends he had traveled to Maui with. Such details would have allowed an investigation into the truth of what he said. While the court admittedly is in no position to determine whether Hevia

committed perjury, if Hevia did do that and if Gordon had reason to know that, Gordon's interest in protecting himself would certainly have made it nearly impossible for him to represent Elliot zealously.

The court granted local counsel's motion to withdraw and, after declaring a mistrial, addressed the issue of whether Gordon could remain as trial counsel. Gordon at first took the position that he would continue on as trial counsel, but, after the Government filed a motion to disqualify Gordon, he voluntarily withdrew. Elliot then hired a new lead trial attorney, who was admitted *pro hac vice*, and a new local attorney. A new trial date was set.

New counsel has filed the present motion to dismiss the indictment, arguing that a new trial would violate the double jeopardy prohibition. Elliot now argues that any conflict of interest was cured by the court during trial and before a mistrial was declared. At the hearing on the present motion, counsel for Elliot admitted that a conflict had indeed been created by Gordon's representation of Elliot and Hevia. However, Elliot's position is that the conflict evaporated once the court appointed separate counsel for Hevia and struck his testimony.

Elliot also argues on the present motion that, because Hevia's testimony was favorable to Elliot and only incriminated the chief Government witness, Meston, no conflict existed. This argument, made in the moving papers, appears inconsistent with the admission of a conflict made at the hearing.

In addition, Elliot argues that the mistrial only protected Hevia at Elliot's expense, that reversal based on any purported conflict would not have been a certainty had the trial continued and Elliot been convicted, and that

the court should not have found a manifest necessity for a mistrial based on any credibility concerns about defense witnesses.

III. ANALYSIS.

A. Elliot Has Waived The Arguments He Now Makes.

Elliot's arguments are barred because he did not make them before the court declared a mistrial, even though the court pressed him for the basis of his objection to the declaration of a mistrial. In the face of question after question from the court, Elliot's counsel stated adamantly that Elliot was not waiving any rights and was preserving all objections. There was no further explication, either factual or legal.

Elliot leads off his motion with the argument that any conflict that may have existed was eliminated when the court struck Hevia's testimony. This is followed by his argument that a conflict could not have existed with a defense witness who only incriminated Meston. These are prime examples of arguments that have been waived. The court, in its letter dated April 19, 2004, specifically asked counsel, "Is a mistrial warranted given the particular circumstances before us? . . . In the first place, here we have a defense witness. . . . In the second place, we have a witness whose testimony has been stricken." The court's letter stated, "I ask that counsel examine [these] issues." In the face of this request, Elliot stood silent on the matter.

It is only now, after a mistrial has been declared, that Elliot addresses these issues. The court cannot fathom how Elliot can decline to address issues squarely presented by the court, then, upon receiving the court's

ruling, argue that the ruling was incorrect based on the very points he previously refused to discuss.

Even having four days before the April 20 conference in which to conduct research about the subject of a mistrial, Gordon took no position as to whether a conflict of interest existed. Nor did he provide the court with any information about his representation of Hevia. While certain matters may well have been privileged, it is not clear to the court that all matters were privileged. For example, Hevia may have been a former client, not an ongoing client. Gordon may have taken Hevia's call about Meston only because of that prior relationship. When Hevia mentioned Meston, Gordon might have immediately declined to represent Hevia. For all the court knows, Gordon, after making sure that Hevia understood that Gordon was not representing him, might have talked to Hevia about Meston only in Hevia's capacity as a witness. If this happened, it would not have been the subject of any privilege. But if it happened, Elliot did not give the court the benefit of knowing it before the court declared a mistrial.

All Gordon would do, even under extensive questioning, was state that his client would not waive any conflict that may have existed. Gordon, at least until counsel was appointed for Hevia during trial, could have been simultaneously representing both Elliot, the defendant, and Hevia, a witness, while the trial was progressing.

Uncertain of the nature of the relationship between Gordon and Hevia, the court could not help but be concerned that there was at least a potential conflict that was affecting how vigorously Gordon was examining Hevia at trial or was making strategic trial decisions. Gordon may

not have elicited all of the favorable testimony he could have gotten from Hevia. Gordon may have refrained from asking certain questions that might have helped Elliot but that might have hurt Hevia. Gordon's intransigence prevented the court from determining what the actual facts surrounding the conflict were.

Nor was Gordon any more forthcoming with respect to any legal position. He cited no law and laid out no analysis in objecting to a mistrial. Elliot's position was only that he was not waiving his rights, including his right to conflict-free counsel.

If Elliot may belatedly explain his rationale in objecting to a mistrial, attorneys during trial would always limit themselves to saying, "I object," and then refuse to explain the basis of the objection. If the attorneys could then later complain about rulings and belatedly explain why they had objected, they would make a mockery of the prior proceedings. States might just as well license parrots who could squawk, "Objection!" every few seconds, for that would then be sufficient to preserve all allegations of error. District court proceedings would be totally lacking in substance, and parties would not have the benefit of actual advocacy. Instead, they would be paying legal fees for mere parrots.

The court is certainly aware that the court itself has obligations to act within the law. That obligation is the basis of reversals on appeal for plain error. But plain error normally occurs when a party has failed to point out an error to the court, and the court itself has not recognized its error. *See United States v. Dipentino*, 242 F.3d 1090, 1094 (9th Cir. 2001) ("We have the authority to reverse a conviction under Federal Rule of Criminal Procedure 52(b)

when: (1) there was an error, (2) the error was plain, and (3) the error affected the defendant's substantial rights."); *United States v. Turman*, 122 F.3d 1167, 1170 (9th Cir. 1997) ("Plain error, as we understand that term, is error that is so clear-cut, so obvious, a competent district judge should be able to avoid it without benefit of objection."). In this case, by contrast, the court recognized the problem, invited counsel to state and explain a position, and was met with unadorned statements that Elliot objected. The court sees that as a waived objection.

The waiver is seen clearly when one notes the similarities between the present situation and the "invited error" situation. In *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002), the Ninth Circuit explained, "The invited error doctrine holds that one may not complain on review of errors below for which he is responsible." Thus, in *United States v. Reyes-Alvarado*, 963 F.2d 1184, 1187 (9th Cir. 1992), the Ninth Circuit noted that, when counsel asked questions about post-arrest statements made by a co-defendant that he thought might benefit his client, and the tactic backfired, the client who was then convicted could not complain about the tactic on appeal. Calling any error "defense-induced," the Ninth Circuit said, "A defendant cannot have it both ways. This was invited error and therefore not grounds for reversal." *Id.* The Ninth Circuit therefore determined that the defendant had waived the right to complain that the court had allowed him to elicit testimony about post-arrest statements made by a co-defendant. *Id.*

Under the invited error doctrine, a court focuses on whether the defendant induced or caused the error, as well as on whether the defendant intentionally relinquished or

abandoned a known right. When a defendant has both invited the error and relinquished a known right, the error is waived and unreviewable. *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (*en banc*). By contrast, an error caused by a defendant that the defendant is unaware of is not waived, but merely forfeited and therefore reviewable for plain error. *Id.* at 846. Here, the refusal of Elliot and Gordon to respond to questions about whether a conflict necessitated a mistrial is akin to an intentional abandonment by Elliot of an argument that there was no conflict necessitating a mistrial.

Instead of explaining to the court why no conflict existed, Elliot in essence invited the court to declare a mistrial by refusing to even deny that a conflict existed. By refusing to take any position as to whether a conflict existed, and by asserting all his rights, including the right to conflict-free counsel, Elliot was taking the position that, if a mistrial was declared, Elliot should go free on double jeopardy grounds. At the same time, if a mistrial was not declared and Elliot were convicted, Elliot appeared to be banking on being able to get the conviction vacated on the ground that his counsel had had a conflict. Elliot was inviting error no matter which way the court ruled; he may not now raise arguments he declined to make then.

While Elliot now also argues that no conflict of interest existed because Hevia's testimony was helpful to his case, this argument was also waived when Elliot failed to respond to a direct question by the court regarding whether the fact that Hevia was a defense witness made a difference in determining the advisability of a mistrial. *See* Letter from the court to Counsel (April 19, 2004), question 1.

Elliot similarly waived his present argument that there was no manifest necessity for a mistrial because there was no conflict that made reversal on appeal a certainty. Before declaring a mistrial, the court had asked Elliot whether a mistrial was warranted given the particular circumstances. *See* Letter from the court to Counsel (April 19, 2004), question 1. Elliot provided no answer to that question.

Elliot also argues in the present motion that the court erred by declaring a mistrial that protected Hevia's rights at Elliot's expense. Elliot made no such argument to the court when the court inquired whether a mistrial should be declared. Again, this argument has been waived. The court notes that, in any event, the argument is contrary to fact. Before declaring a mistrial, the court clearly articulated at least the potential conflict that could harm Elliot.[1] Elliot did not deny the existence of that conflict, though given many opportunities to do so by the court. In addition, Elliot declined to waive that potential conflict. Elliot's present argument that the mistrial provided no protection to him is contrary to the position he took before the court declared a mistrial, a position that was premised on preserving any rights he had relating to a possible conflict.

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[1] The court reiterated its concerns about Elliot's interests in the Order Granting Mistrial. In that order, the court said that it was finding a manifest necessity for a mistrial to, among other things, ensure that Elliot, who had not waived his objection to any conflict of interest, was represented by conflict-free counsel. Order Granting Mistrial (April 21, 2004) at 1.

B. The Court Did Not Declare a Mistrial Simply Because It was Concerned About the Credibility of Certain Defense Witnesses.

Elliot's present motion also complains that the court's concern about the credibility of defense witnesses does not constitute a manifest necessity for a mistrial. This is the only argument that arguably was not waived. The court says this because the court admittedly did not tell Elliot before declaring a mistrial that the court's decision was influenced by concern about the credibility of defense witnesses. It was only in the written order that followed the court's oral declaration of a mistrial that the court mentioned that its concerns about credibility were related to its ruling. Nevertheless, this argument is unpersuasive because it misses the point.

The court agrees that there is no authority allowing a court to declare a mistrial just because the court thinks defense witnesses are unbelievable. The court looked to the witnesses' credibility here, however, only because it affected the court's evaluation of whether Gordon had at least a potential conflict. If the witnesses were testifying truthfully, then there were two possible conflicts. The first was the conflict created by Gordon's potentially divided loyalty between his two clients, Hevia and Elliot. The second was the conflict between Gordon's interest in avoiding charges of unethical conduct that might jeopardize his license to practice law, and his duty to represent Elliot zealously. However, if the witnesses were lying, then Gordon had an additional conflict. This additional conflict was a drastic expansion of the self-interest conflict noted above, as the additional conflict could implicate criminal charges. This third conflict involved the conflict between his self-interest in preventing

himself from being connected (rightly or wrongly) to the crime of perjury, and his duty to represent Elliot zealously. The court's concern about credibility was great enough that the court raised the possibility of perjury in its written order. This concern in turn gave rise to the potential for this third conflict on Gordon's part.

Even if Elliot could not be said to have waived the argument that credibility determinations do not justify a mistrial, that argument has no place here because no mistrial was declared based on the court's disbelief of any witness. Elliot's argument misses a step. While the court did indeed have credibility concerns, Elliot ignores the connection between those credibility concerns and what appeared to be a third conflict. It was the existence of all of these potential conflicts, which Gordon refused to deny, combined with Elliot's decision not to waive any conflict and the assertion of all his rights, including his right to conflict-free counsel, that led to the declaration of a mistrial.

C. The Mistrial Was a Manifest Necessity.

Even assuming that Elliot did not face a waiver problem with most of his arguments, those arguments, examined on their merits, are unconvincing. A new trial does not expose Elliot to double jeopardy, as he argues.

The Fifth Amendment's Double Jeopardy Clause prohibits successive prosecutions for the same criminal offense. *See United States v. Dixon,* 509 U.S. 688, 695-96 (1993). In a jury trial, jeopardy attaches when the jury is empaneled and sworn. *Thomas v. Municipal Court of the Antelope Valley Judicial Dist. of Cal.,* 878 F.2d 285, 287 (9th Cir. 1989). However, when, as in this case, a mistrial

has been declared over a defendant's objection after jeopardy has attached, a defendant may still be reprosecuted without infringing the Double Jeopardy Clause if the trial was terminated because of manifest necessity. *Id.*

Whether a manifest necessity for a mistrial existed is not determined by the application of any mechanical formula, but rather on a case-by-case analysis. *Illinois v. Somerville,* 410 U.S. 458, 462 (1973). Calling for a "general approach," the Court stated:

> A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial. If an error would make reversal on appeal a certainty, it would not serve 'the ends of public justice' to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court.

Id. at 464; *accord Wilcox v. McGee,* 241 F.3d 1242, 1245 (9th Cir. 2001) (manifest necessity exists only when an error would make reversal on appeal a certainty).

This approach recognizes that a defendant's right to have his trial completed by a particular jury must sometimes "be subordinated to the public's interest in fair trials designed to end in just judgments." *United States v. Jorn,* 400 U.S. 470, 580 (1971). In exercising its discretion in evaluating whether it should grant a mistrial, a court must consider the "important factor" of "the need to hold litigants on both sides to standards of responsible professional conduct in the clash of an adversary criminal process." *Id.* at 485-86.

The Ninth Circuit has found manifest necessity supporting a mistrial under circumstances similar to those presented during Elliot's trial. In *Thomas,* an attorney defended a husband in a criminal case in which the husband was charged with having assaulted and battered his wife. This was the wife's second husband, and she had been represented in her divorce from her first husband by the same attorney who was defending her second husband in the criminal case. This same attorney was also representing the second husband in divorce proceedings from the wife even while providing a defense in the criminal case.

In his opening statement to the jury in the criminal case, the attorney said that the wife had fabricated the assault charges in retaliation for allegations by the husband in the divorce proceedings that the wife was a bigamist, having married the husband before her divorce from her first husband became final. Subsequently, in a discussion in chambers, the attorney revealed that he had represented the wife in her initial divorce proceedings. The prosecution then moved for a mistrial based on the conflict of interest by the attorney. The attorney denied the existence of such a conflict, saying that he would abandon the bigamy motive defense. The court declared a mistrial. *Thomas,* 878 F.2d at 286. The husband then claimed that a retrial was barred by the Double Jeopardy Clause.

The Ninth Circuit concluded that the trial court had not erred in declaring a mistrial based on manifest necessity, as the husband had not agreed to waive the conflict. In so concluding, the Ninth Circuit first examined whether a conflict existed, noting that every criminal defendant has a Sixth Amendment right to assistance of counsel "unhindered by a conflict of interest." *Id.* at 288 (quoting

United States v. Wheat, 813 F.2d 1399, 1402 (9th Cir.), *aff'd on other grounds,* 486 U.S. 153 (1987)). The *Thomas* panel examined whether the attorney had confidential information about the wife, his former client. It also noted that the attorney's current client, the husband, had the right to expect that his lawyer would "use every skill, expend every energy, and tap every legitimate resource . . . in undertaking representation on his client's behalf." *Id.* at 289. The attorney's proposal to abandon the bigamy motivation defense underscored what the Ninth Circuit viewed as the attorney's ethical dilemma in the case. *Id.* at 290.

The Ninth Circuit stated:

> Had the trial court simply proceeded with the trial, reversible error would have been built in because the record would have demonstrated that Dr. Thomas[, the husband,] did not have effective, conflict-free representation. We should be aware of the trial court's prospects of being "whip-sawed" by assertions of error no matter which way it rules.

Id.

At the hearing on the present motion to dismiss, Elliot's new counsel admitted what Gordon had refused to admit or deny – that Gordon had had some type of conflict, at least until Hevia's testimony was stricken. It was unclear from the facts that developed during the cross-examination of Hevia whether Gordon had simultaneously represented Hevia and Elliot, or whether there had been successive representation of Hevia and Elliot. There clearly was, in either event, the potential for conflicting interests between Hevia and Elliot, as well as the potential for conflicting interests between Elliot and Gordon.

Gordon initially represented to the court that Hevia did not have an attorney. *See* Testimony of Sergio Hevia (April 15, 2004) at 7-109. It therefore came as a surprise to the court to learn from Hevia that, having been represented a few years earlier by Gordon in connection with traffic tickets, he had sought legal advice from Gordon regarding conversations with Meston about the package at issue in this case. *Id.* at 7-180 to 7-185, 7-196. Hevia's testimony gave the court concern that Hevia, even while testifying as a witness in this case, was relying on Gordon as counsel. The court was, however, unable to obtain information from Gordon about the nature of his relationship with Hevia. *Id.* at 7-191. Gordon stated that he could not provide details about his representation of Hevia because he "had issues of confidentiality." Id. at 7-192. The court was therefore faced with the possibility that Gordon was representing both Elliot and Hevia at the time of trial. To ensure protection of Elliot's Sixth Amendment right to conflict-free counsel, the court had to assume this was so. Elliot now concedes that some kind of conflict existed, at least before the court struck Hevia's testimony.

Gordon also gave the clear impression that his personal interests were adverse to Elliot's. Instead of denying that there was a conflict, Gordon refused to take a position on the question of whether there was or was not a conflict. The court actually expected a vigorous denial of a conflict, and when that was not forthcoming and instead Elliot said that he was preserving all his rights, the court had to conclude that Gordon was concerned about himself.

Elliot argues that there was no manifest necessity supporting the mistrial. He says that a mistrial was unwarranted because, had the trial proceeded and had he been convicted, reversal on appeal would not have been a

certainty. There may well have been explanations that, had they been provided to the court before it declared a mistrial, would have assured the court that a reversal would not have been a certainty. However, the court received no such explanations.

The Supreme Court has stated, "Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial." *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980). Courts therefore usually rely on the good faith and judgment of defense counsel to determine whether a conflict exists because that counsel "is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." *Id.* at 347. "Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." *Id.* Unfortunately, in the present case, Gordon did not provide the court with information that could have avoided a mistrial. Instead, Hevia's testimony came as a surprise to the court in the midst of trial. That testimony raised serious concerns that Gordon and Elliot did nothing to dispel.

Elliot now argues that a reversal of any conviction would not be a certainty because there is no evidence that Gordon's performance would have been adversely affected by any conflict. Elliot relies on *Mickens v. Taylor*, 535 U.S. 162, 173-74 (2002), in which the Supreme Court held that the trial court's failure to inquire into a potential conflict of interest on the part of the defendant's attorney, about which the court knew or reasonably should have known, did not automatically require reversal of the conviction. Instead, to void the conviction, the defendant had to establish that the conflict of interest had adversely

affected his counsel's performance. *Id.*; *Cuyler v. Sullivan,* 446 U.S. 335, 348 (1980) ("In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."). Elliot's argument is that, just as the lawyer's conflict in *Mickens* did not support a reversal, Gordon's conflict in the present case did not make a reversal a certainty.

The court notes that it is not at all clear that the reasoning in *Mickens,* which was a habeas corpus case under 28 U.S.C. § 2254, applies to the mistrial situation. In other words, a reversal of a conviction in a habeas case may be much harder to obtain than a reversal in a direct appeal of a criminal conviction. *See Engle v. Isaac,* 456 U.S. 107, 134-35 ("The federal courts apply a plain-error rule for direct review of federal convictions. Fed. Rule Crim. Proc. 52(b). Federal habeas challenges to state convictions, however, entail greater finality problems and special comity concerns. We remain convinced that the burden of justifying federal habeas relief for state prisoners is greater than the showing required to establish plain error on direct appeal.") (internal quotation omitted); *Lindh v. Murphy,* 521 U.S. 320, 334 n.7 (1997) (noting that the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d), imposes a "highly deferential standard for evaluating state-court rulings"). Even assuming that the certainty of a reversal should be measured by the same standard in habeas cases and in direct appeals, *Mickens* does not establish that reversal would not have been a certainty in the present case.

The court's own observations of Gordon's actions gave the court concern that the conflict was indeed adversely affecting Gordon's performance. In its written order

declaring a mistrial, this court was struggling to determine whether Gordon had actual conflicts of interest. The court's effort was hampered by Gordon's refusal to fulfill his duty to advise the court about his conflicts. *See Holloway v. Arkansas,* 435 U.S. 475, 485 (1978) ("defense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem"). This court attempted to determine the nature and extent of Gordon's conflicts so that it could "take adequate steps" to protect Elliot's rights. *See id.* at 484. Gordon's refusal to deny that he had conflicts was, for purposes of the court's analysis, tantamount to an admission that the potential conflicts the court envisioned were actual conflicts. To have proceeded under those circumstances, especially when Elliot appeared to be under Gordon's control, would not have protected Elliot's constitutional rights.

What Elliot now concedes was the conflict Gordon had, at least until Hevia's testimony was stricken, certainly affected Gordon's performance. Gordon refused to answer any of the court's numerous questions regarding whether the court should strike Hevia's testimony. Instead, Gordon put forth an incomprehensible objection to the striking of the testimony, refusing to explain what he was saying. The court can only conclude that Gordon adopted this strategy either to protect client confidences or to cover himself.

Even accepting Elliot's position on this motion that the conflict arising out Gordon's representation of Elliot and Hevia was cured when the court struck Hevia's testimony, there was still the conflict between Gordon's personal interests and his duty to Elliot. Even after Hevia's testimony was stricken, Gordon refused to state whether he had a conflict of interest. If Elliot's present

argument is correct and there was no longer any conflict relating to Gordon's divided loyalties to Hevia and Elliot, Gordon's refusal can be explained only as an attempt to protect himself. At that point, Gordon had to be concerned that at least ethical charges might be brought against him. The refusal did not advance Elliot's case. In fact, the refusal at that point hurt Elliot by giving the court the impression, which the court clearly expressed before deciding to declare a mistrial, that Elliot was attempting to create appellate issues. Gordon's insistence on continuing his refusal to respond to the court's questions was evidence that there was an ongoing conflict between Gordon himself and his client. A reversal under these circumstances was indeed a certainty, assuming that is the correct standard. The ends of justice were most certainly not served by the continuation of the proceedings. *See Jorn*, 400 U.S. at 485.

IV. CONCLUSION.

For the foregoing reasons, Elliot's motion to dismiss is denied.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, October 1, 2004.

/s/ Susan Oki Mollway
SUSAN OKI MOLLWAY
UNITED STATES DISTRICT JUDGE